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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

NO. _____

NEWPARK SHIPBUILDING & REPAIR, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Petitioners

v.

JAMES P. ROUNTREE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

NEWPARK SHIPBUILDING & REPAIR, INCORPORATED and American Home Assurance Company,
Petitioners,

v.

James P. ROUNDTREE [sic] and Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

No. 81-4308.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Jan. 23, 1984.

Employer appealed order of Benefits Review Board concerning claim for workers' compensation under Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, in a panel opinion, 698 F.2d 743, reversed and remanded. A rehearing was granted, 706 F.2d 502. The Court of Appeals, Tate, Circuit Judge, held that order of Benefits Review Board on claim for workers' compensation under Longshoremen's and Harbor Workers' Compensation Act, which determined employer's compensation liability to injured worker but which remanded case to administrative law judge for further proceedings, was not a "final order" within contemplation of Act and was, therefore, not subject to judicial review.

Petition for review dismissed.

Jerre S. Williams, Circuit Judge, dissented and filed an opinion in which Clark, Chief Judge, and Brown and Garza, Circuit Judges, joined.

E. D. Vickery, Houston, Tex., for petitioners.

Stephen Vaughan, Houston, Tex., for Roundtree.

Laurie M. Streeter, Assoc. Sol., Mark C. Walters, Marianne Demetral Smith, Joshua T. Gillelan, II, U.S. Dept. of Labor, Washington, D.C., for respondents.

Petition for Review of an Order of the Benefits Review Board.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.*

TATE, Circuit Judge:

The employer ("Newpark") filed a petition in this court to review an order of the Benefits Review Board with regard to the claim of its disabled former employee Roundtree for benefits under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901 *et seq.* The Board's order determined the method by which the claimant Roundtree's periodic compensation rate was to be calculated, but it also remanded the case to the administrative law judge for further findings and proceedings. A motion to dismiss the appeal as being

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* Judge Garza, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeal now subject to en banc review. 28 U.S.C. § 46(c). Judges Randall and Davis did not participate in the consideration or decision of this case.

from a non-final adminstrative determination was denied by a divided panel, 698 F.2d 743 (5th Cir. 1983), which proceeded to determine a substantive issue on its merits and likewise remanded for further proceedings. We granted en banc rehearing, 706 F.2d 502 (1983), primarily to determine whether the Board's determination was a reviewable "final order", a statutory prerequisite under the Act for judicial review of the Board's rulings. § 921(c).[1]

Contrary to the panel, we dismiss the present petition for review. Applying the well-settled general rule that a judgment or order is not final unless it ends the litigation on the merits and leaves nothing for the trier to do but execute the judgment, we hold that the present Board order—which determined a central issue of liability, but which nevertheless also remanded the administrative proceedings to the administrative law judge for further findings—is not a "final order", § 921(c), so as to be statutorily subject to judicial review at this time.

I.

We will detail the facts somewhat more fully below. For present purposes, we note only that the Board's order, which determined the method of computing compensation and remanded the proceedings for further findings, was concededly not final in any "technical" sense. The panel majority, however, found it to be reviewable at this time on a concept of pragmatic finality, since upon the court

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1. 33 U.S.C. § 921(c) provides: "Any person adversely affected or aggrieved by a *final order* of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred by filing in such court within sixty days following the issuance of such Board order a written petition that the order be modified or set aside. * * *" (Emphasis added.)

panel deciding a central issue (and reversing the Board as to it), the factual record as to this issue was now complete, although some unresolved collateral issues also remained for decision by the administrative proceedings upon remand. 698 F.2d at 747 & n. 2, 748 & n. 3.

[1] The issue thus drawn is whether the Board's order, under such circumstances, should be deemed a "final order" and thus subject to judicial review under § 921(c). The required finality for reviewability of an order of the Board follows, for the same reasons of policy, the contours of the finality-requirement under 28 U.S.C. § 1291 for appealability of decisions of the district courts. *Simms v. Valley Line Company,* 709 F.2d 409, 413 (5th Cir. 1983); *Director, Office of Workers' Compensation Programs v. Brodka,* 643 F.2d 159, 161 (3d Cir. 1981); *National Steel and Shipbuilding Company v. Director, Office of Workers' Compensation Programs,* 626 F.2d 106, 107-08 (9th Cir. 1980); *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs,* 590 F.2d 1267, 1268 (4th Cir. 1978) (all four decisions dismissing petitions of review because of non-finality of the Board's order).

In *Firestone Tire & Rubber Company v. Risjord,* 449 U.S. 368, 373-74, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981), the Supreme Court has recently restated the general test for finality as being a decision "that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978), quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

This finality rule is designed to avoid piecemeal trial and appellate litigation and the delays and costs of multiple appeals upon both parties and courts, as well as to provide a clear test so that needless precautionary appeals need not be taken lest substantive rights be lost. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical effect, a single controversy." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170, 94 S.Ct. 2140, 2149, 40 L.Ed.2d 732 (1974). "This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice * * *." *DiBella v. United States,* 369 U.S. 121, 124, 82 S.Ct. 654, 656, 7 L.Ed.2d 614 (1962). "Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States,* 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940), quoted with approval in *Firestone, supra,* 449 U.S. at 174, 101 S.Ct. at 673. *See also* 15 Wright, Miller, and Cooper, Federal Practice and Procedure, §§ 3907, 3909 (1976).

Nevertheless, the Court has recognized a small number of narrow exceptions to this general rule that appealable finality is accorded only to a judgment or order that completely terminates the litigation below.[2] Under these

2. In *Huckeby v. Frozen Food Express,* 555 F.2d 542, 547-49 (5th Cir. 1977) (Clark, J.), in dismissing an appeal on non-finality grounds, we summarized the three principal doctrinal exceptions. We observed that the three doctrines were "united by a common theme . . . [E]ach applies only where there is 'an order otherwise

exceptions, the requirement of finality is "given a 'practical rather than a technical construction' ". *Eisen, supra,* 417 U.S. at 171, 94 S.Ct. at 2149. The exceptions arise from considering "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Id. See* 15 Wright, Miller, and Cooper, *supra,* § 3907. Both the petitioner Newpark and the panel majority, in asserting the reviewable finality of the present Board order, essentially rely upon an exception of pragmatic finality that was recognized by *Gillespie v. United States Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

We will not here detail the facts nor attempt to analyze the several strands of reasoning by which *Gillespie,* because of the competing considerations, held to be appealable a technically non-final order, save to observe that none of *Gillespie's* exceptional reasons are apparent here. As recently summarized by the Court,

> In *Gillespie,* the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292(b) [permitting discretionary reviewing of interlocutory rulings]," *id.,* at 154, 85 S.Ct. at 312, and the arguable finality issue had not been presented to this Court [after certiorari was granted] until argument on the merits, thereby ensuring that none of the policies of judicial

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non-appealable, determining substantial rights of the parties *which will be irreparably lost if review is delayed until final judgment.*' " 555 F.2d at 549 (emphasis the court's).

> economy served by the finality requirement would be achieved were the case sent back with the important issue undecided. . . . If *Gillespie* were extended beyond the unique facts of that case, § 1291 [the finality requirement] would be stripped of all significance.

Cooper & Lybrand, supra, 437 U.S. at 477 n. 30, 98 S.Ct. at 2462.

II.

Newpark contends, however, that despite this limited construction of *Gillespie* recently accorded by the Court itself, that decision's continued viability for application to the present Board order is demonstrated by *American Export Lines, Inc. v. Alvez,* 444 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980). There, citing *Gillespie,* the Court did not reject review of an interlocutory amendment ruling in a state court action as non-final. (The amendment in the state court action, affirmed by the state's high court, had permitted a harborworker's wife to assert a claim under general maritime law for loss of her injured husband's society.) The issue before the Court in *Alvez,* however, is distinguishable from that before us now.

The issue before us concerns the concept of finality under 33 U.S.C. § 921 and 28 U.S.C. § 1291, which afford an aggrieved party review in the court of appeal as of right. In *Alvez,* the issue arose under 28 U.S.C. § 1257(3), where a "final" judgment of a state's highest court is reviewable by discretionary grant of certiorari where a right is claimed under federal law.

In *Alvez, after* the court had granted certiorari, it sua sponte noted that the jurisdictional issue, observing

that "were the case in the posture it stood when petition for certiorari was granted, we might well determine that the judgment lacked sufficient characteristics of finality to warrant an assertion of our appellate jurdisdiction." 446 U.S. at 277, 100 S.Ct. at 1675. However, after certiorari had been granted, the case was tried in the state trial court and the plaintiffs prevailed, with "no federal question, except that which we are now asked to resolve," remaining in the litigation. 446 U.S. at 277-78, 100 S.Ct. at 1675-76. The Court noted that " 'the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.' " 446 U.S. at 279, 100 S.Ct. at 1676.

Alvez is not apposite to the present issue. While the concepts of finality for Supreme Court review of state court judgments under 28 U.S.C. § 1257 and for court of appeal review of district court judgments under 28 U.S.C. § 1291 are often parallel, they also diverge in some aspects because of the Supreme Court's different and additional function in § 1257 review of state court judgments to protect federal rights. 15 Wright, Miller, and Cooper, *supra*, § 3909;[3] 16 Wright, Miller, Cooper,

3. *See* 14 Wright, Miller, and Cooper, *supra*, § 3909, p. 439:

> The conflicting forces that tug the Supreme Court toward and away from a strict interpretation of the finality requirement in reviewing state court decisions, in short, are quite different from the forces at work when it becomes a question of interpreting the finality requirement for appeals from district court decisions. Deference to state courts and the desirability of avoiding Supreme Court determination of constitutional questions may at times suggest that finality should be denied to judgments that might appropriately be brought to a court of appeals from a district court. More importantly, however, the need to protect federal rights against erosion by interlocutory state court rulings may make it desirable to review state court decisions in situa-

and Gressman, Federal Practice and Procedure, § 4010 (1977). Thus, one of the exceptions in § 1257 review according reviewable pragmatic finality to a technically interlocutory *state* ruling is where the *federal* issue has been finally determined in the *state* court proceeding. *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1042, 43 L.Ed.2d 328 (1975).[4]

Alvez accorded pragmatic finality to the state court ruling on the federal issue partly because of the functional purposes of review of state court judgments under § 1257 —different and distinguishable in this respect from those according "finality" to district court judgments under § 1291 or to Board decisions under 33 U.S.C. § 921(c)

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tions in which court of appeals review of a district court decision would rest on some basis other than the final judgment rule. The only common thread running between decisions in these two contexts should be that the requirement of finality is approached pragmatically, with an eye to flexible accommodation of the quite different interests at work in each area. For this purpose, decisions in the two areas may properly be cited interchangeably. For purposes of more explicit comparison, however, it should be plain that decisions in one area cannot be binding precedent in the other.

4. *Cox Broadcasting Corporation v. Cohn,* 420 U.S. at 82-83, 95 S.Ct. at 1040:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

—and also because of the exceptional posture of the proceeding before it: *after* certiorari was (improvidently) granted, the state court judgment became (the court found) final for § 1257 purposes. It was in that context that *Alvez* relied upon the *Gillespie* exception to strict finality, quoting from that decision: " '[N]ow that the case is before us . . . the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided.' " 444 U.S. at 279, 100 S.Ct. at 1676.

Alvez thus cannot be regarded as blanket authority for a court of appeal—to which review is sought of right from a "final" decision—to disregard the Congressionally mandated finality limitation upon its review powers and to ignore the powerful reasons of policy underlying the finality requirement, *see* I *supra,* in order to accord reviewable pragrmatic finality to the trier's decision, whenever the reviewing court on a case-by-case basis determines that it would be more efficient to review immediately a central issue raised in review sought from a nonfinal decision.[5]

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5. Newpark urges that the decisions of the Supreme Court in *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission,* _____U.S._____, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) and *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) support its claim that the Board's decision in the present case is reviewable. These decisions are not apposite to the issue before us. Neither concerned any issue as to "finality" of an agency decision for direct-review purposes within a statutory framework. Both concerned an attempt to challenge governmental action by actions requesting declaratory and injunctive relief, and the primary issue was whether the controversy was "ripe" for judicial review.

The issue before us concerns finality, not ripeness. While there is significant overlap between the two doctrines, the questions of ripe-

III.

The issue before us arises in the following factual and procedural context:

Roundtree claims disability benefits under the Longshoremen's and Harbor Workers Compensation Act. Roundtree, a welder, was injured on his first day of work as an employee of Newpark. Prior to this employment, he had worked for twenty years as an independent contractor. By the time the proceedings came before the Board, the principal (but not only) issue concerned the determination of his weekly wages, 33 U.S.C. § 910, for purposes of computing the periodic compensation payments he claimed to be due to him.

Newpark contended that the weekly wage basis should be determined on the basis of § 910(b) (the prior year's wages of co-workers). The Board affirmed the administrative law judge's decision that, instead, the determination of the wage basis should be based upon § 910(c) (an alternative section applicable to "arriving at the average annual earnings of the injured employee," if the other statutory methods, § 910(a) and § 910(b) "cannot reasonably and fairly be applied", which may take into consideration other factors, "including the reasonable value of the services if engaged in self-employment" during the

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ness and finality in administrative law address different issues concerning the preclusion of judicial review of administrative action that depend upon the nature of the agency action for which review is sought. *See* 4 Davis, Administrative Law Treatise, § 25.6 (discussing *Abott Laboratories* and the ripeness doctrine) and § 26.10 (discussing finality of agency action) (2d ed. 1983). While "ripeness" is primarily concerned with preventing judicial review of hypothetical or abstract problems that may not come to pass, see *Davis, supra,* § 25.1, the finality requirement seeks mainly to ensure that the parties have exhausted all avenues of administrative relief before resorting to appellate judicial review. *Davis, supra,* § 26.10.

preceding year). However, the Board disagreed with the method used by the administrative law judge to determine the annual earnings of the preceding year, vacated the award of compensation, and remanded for further proceedings, including the determination of unresolved issues, such as attorney's fees.[6]

IV.

The uniform jurisprudence of this and every other circuit that has considered the issue is that a Board order, which determines liability but which remands to the administrative law judge to determine the award, is not a reviewable "*final* order" of the Board under § 921(c). *Director, Office of Workers' Compensation Programs v. Brodka,* 643 F.2d 159, 161 (3d Cir. 1981); *National Steel and Shipbuilding Company v. Director, Office of Workers' Compensation Programs,* 626 F.2d 106, 107-08

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6. The remand portions of the Board's order are as follows:

Because the administrative law judge failed to fully consider the foregoing, this case must be remanded for additional findings of fact and conclusions of law. On remand, the administrative law judge must determine the reasonable value of claimant's services when self-employed by considering the cost of hiring another welder of skill and experience comparable to claimant or by using any other rational means. The administrative law judge may open the record to take additional evidence as is necessary.

* * * * * *

Employer contends that the administrative law judge's award of temporary partial disability benefits and an attorney's fee should be vacated if claimant receives a lower average weekly wage. Since we have concluded that the case must be remanded to the administrative law judge for redetermination of claimant's average weekly wage, consideration of these issues at this time is not appropriate.

Claimant's attorney seeks a fee for work performed before this Board. Since this case must be remanded to the administrative law judge, a fee for this work is not appropriate at this time.

(9th Cir. 1980); *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs,* 590 F.2d 1267, 1268 (4th Cir. 1978); *United Fruit Company v. Director, Office of Workers' Compensation Programs,* 546 F.2d 1224 (5th Cir. 1977); and reported and unreported decisions therein cited. As stated in the seminal reported decision of this line of cases, "[i]t is a well-established rule of appellate jurisdiction, however, that where liability has been decided but the extent of damage remains undecided, there is no final order." *Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board,* 535 F.2d 758, 760 (3d Cir. 1976). Therefore, in all of these decisions, petition for review of a Board remand order under such circumstances have been dismissed for lack of reviewable finality under § 921(c).

The panel opinion recognized that this principle ordinarily applied, but it felt that, weighing the competing values, the danger of denying justice by delay outweighed the value incorporated in the finality rule of the inconvenience and costs of piecemeal litigation. 698 F.2d at 746-48. It felt that, by deciding the issues presented on the appeal, "the remaining issues will not be questions of law but merely the largely ministerial job of applying the law to the pre-existing record," 698 F.2d at 747, and it distinguished the above precedents as, unlike the present case, having "unresolved factual determinations that appellate review could not settle." *Id.* The panel recognized that, however, "some unresolved collateral issues may remain in the instant case, as presented in this appeal", such as determining the amount of attorney's fees (*see also* note 6 *supra*). 698 F.2d at 748.

The panel then reached the merits of Newpark's petition for review and, reversing the Board's determination

that § 910(c) applied, held that § 910(b) provided the appropriate statutory methodology by which to determine Roundtree's average weekly wage. We note, however, that if instead—after deciding the merits—the panel had affirmed the Board's determination that § 910(c) provided the appropriate methodology, then (as the Board held) the record was not factually complete. The panel's determination that, on its deciding the legal principle of law, the remand would be a largely ministerial function of applying that principle to the preceding record thus depended on its first deciding the merits of the appellate proceeding, *i.e.*, whether § 910(b) applied (in which event, in the panel's view, the record was factually complete), instead of § 910(c), as the Board had determined.[7] In essence, under this methodology, neither the court nor the parties could know whether the record was factually complete for purposes of reviewable "finality" until the court had first determined the merit-issue and thereafter decided whether the administrative record was factually complete so as to justify review at this time.

The panel's case-by-case methodology of determining pragmatic finality for purposes of reviewability is thus in fundamental conflict with the values and purposes of the finality rule to avoid the delay and system-costs of piecemeal and multiple appeals, and to provide a relatively clear test of appealability so that needless precautionary appeals not be taken. *See* I *supra*. "Any such *ad hoc* decisions [ascribing reviewable finality to techni-

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7. In explaining its view that the record was factually complete, the panel noted "we find the record to contain clear and ample evidence of Roundtree's earnings, the earnings records of his co-workers, and all other necessary information concerning the wages of Newpark's welders. The task of applying § 910(b) to the existing records will be ministerial in nature." 698 F.2d at 747, n. 2.

cally non-final decisions] disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181, 75 S.Ct. 249, 253, 99 L.Ed. 233 (1955). As we stated in *Freeman v. Califano,* 574 F.2d 264, 267 (5th Cir. 1978), where under circumstances somewhat similar to the present case we dismissed an appeal and rejected *Gillespie* pragmatic-finality arguments,

> the potential evil of here establishing a precedent for other piecemeal appeals in other cases is real. Here the balance appears to be struck in favor of a finding of nonappealability. There is simply no significant countervailing interest here to outweigh the dominant and traditional policy of requiring a final decision to avoid piecemeal appeals.[8]

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8. From the filings of the opposing parties we may obtain some perspective of the potential for multiplication of appellate caseload and delay should we abandon the previous settled rule that a Board order is non-final, and thus nonreviewable, where the Board order determines liability or other issues of the appeal to it, but remands to the administrative law judge for further proceedings. On February 28, 1983, there were 4,942 cases pending before the Board, with new appeals averaging 220 per month; it is estimated approximately 40% of these will result in Board orders remanding the cases for further appropriate action. Director's Petition suggesting rehearing en banc, p. 10, filed March 22, 1983. Newpark states there were a total of 351 Board orders reported between October 30, 1980 and June 10, 1983, of which 145 resulted in remand orders; however, Newpark argues that most of the remand orders would not be subject to *Gillespie* pragmatic finality review and points out of that 1,409 decisions, rendered by the Board in the first thirteen volumes of the Board's decisions, only 13 published court of appeals cases involved an issue raised as to the finality of the Board's decision. Newpark's letter brief of September 28, 1983, and attached exhibits. What Newpark may overlook, however, is that—were the present non-finality rule of Board remand orders changed—many more appeals from such presently non-final orders might result to test their pragmatic finality, albeit most unsuccessfully, and thus many more issues as to *Gillespie* pragmatic finality might have been presented as a threshold issue in

[2] For these reasons, we therefore find, consistent with all prior jurisprudential determinations under such circumstances,[9] that the present Board order, which determined the employer's compensation liability to the injured worker but which remanded to the administrative law judge for further proceedings, is not a final order within

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the judicial review thus sought. This indeed was the experience of the Commonwealth Court of Pennsylvania, which entertains appeals from the Pennsylvania workmen's compensation administrative agency and which experimented with, and then abandoned, allowing reviewable pragmatic finality to board remand orders on *Gillespie*-type reasoning, as detailed in *Murhon v. Workmen's Compensation Appeal Board*, 51 Pa. Cmwlth. 214, 414 A.2d 161, 162-63 (1980):

> Over the last ten years this Court, following *Overmiller v. D.E. Horn & Co., Inc.*, 191 Pa. Super. 562, 159 A.2d 245 (1960), has departed from the well established doctrine that remand orders of the Board are interlocutory and not appealable. In doing so we have developed three exceptions as set forth in *American Can Co. v. Workmen's Compensation Appeal Board*, 37 Pa. Cmwlth. 169, 389 A.2d 263 (1978): the appeal to the Board resulting in remand was untimely; the remand, based on the record, could not produce a different result; or the Board's action in granting the remand was based on a clear error of law. As explained in the decisions which developed the exceptions, it was felt there would be a saving of litigants' time and money if these exceptions were allowed. Our experience has been that the existence of the exceptions has been counterproductive. Apparently the party suffering the remand now files an appeal hoping he can convince this Court that his case fits into one of the exceptions or that he can develop still a further exception. Indeed it has gotten to the point, as here, that there are cross-appeals from a remand order!
>
> In view of this, our Court now returns to the time tested doctrine that a remand order of the Board is interlocutory and unappealable as a matter of right, without exception.

9. So far as we can ascertain, the only Board remand order that has been held to have reviewable pragmatic finality was in *Ingalls Shipbuilding Division v. White*, 681 F.2d 275 (5th Cir. 1982). The petition for judicial review in that case, *see* discussion in V *infra*, raised issues of central importance in the administration of the Act, with unique reasons for allowing exceptional pragmatic finality. It is not of controlling significance, if only because its holding should be limited to its exceptional facts. *See* V *infra*.

the contemplation of § 921(c) and is, thus, not subject to judicial review at this time, since it did not end the litigation on the merits and leave nothing for the trier to do but execute the judgment.

V.

The panel relied not only upon *Gillespie*, but also upon the decision of this circuit in *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), which itself had relied upon *Gillespie*, in according reviewable pragmatic finality to a Board's remand order. The issue there involved an extremely important general question in the administration of the Longshoremen's Compensation Act whether an administrative law judge had the power to approve settlements by an injured worker (as the administrative law judge and the Board held), or instead whether this power was vested in the Deputy Commissioner and the Secretary (as the Director of the Office of Workmen's Compensation Programs urged). The Board, affirming the power of the administrative law judge to approve a settlement, nevertheless remanded the settlement to the judge for him to approve or disapprove it under Board-specified guidelines. The Director filed a petition for review in this court.[10]

The *Ingalls* panel accorded pragmatic finality to the Board's remand order and entertained review of it under § 921(c), based upon *Gillespie* and *Gillespie*-type reasoning. The panel pointed out the delay inherent in remand-

10. The petition also raised an important question of first impression as to whether the Director had standing to petition to review a Board order with which both employer and employee were satisfied, as well as the then unsettled important issue of whether the Director had standing to petition the Board for review of the administrative law judge's ruling as a statutory "party in interest."

ing and the ease of deciding the issues then so as to expedite earlier termination of the proceedings—on reasoning similar to that of the panel in the present case, albeit here on issues applicable to benefits due a single claimant rather than, as in *Ingalls,* on central issues of the administration of compensation scheme. *Ingalls* is, however, the only judicial decision that has held that a Board remand order is reviewable under § 921(c), insofar as we can ascertain, and in *Ingalls* the issue decided on that appeal could ultimately have been brought to the court for review after a final order of the Board (although admittedly the somewhat exceptional circumstances (both employer and employee were satisfied with the Board ruling) made that course somewhat unattractive and cumbersome).

A dismissal of the present petition for review for lack of jurisdiction because the remand order is not final, § 921(c), could possibly rest on leaving *Ingalls* undisturbed, distinguishable and limited to its facts in its pragmatic-finality ruling because of its exceptional circumstances and the central importance of the issues requiring decision. We have decided, however, that *Ingalls* should be overruled, for its value in occasionally permitting reviewable pragmatic finality to Board remand orders is outweighed by its erosion of the values of the finality rule mandated by Congress as a prerequisite for our appellate jurisdiction, considering also the necessary uncertainty (as is illustrated by the present case) that must exist in the administration of a judicially created pragmatic-finality exception, where definable standards for allowing this extra-statutory appeal of right are virtually impossible to formulate.

Conclusion

Since the remand order of the Board is not a final order as required by 33 U.S.C. § 921(c), we lack jurisdiction to review it, and the Newpark's petition for review is DISMISSED.

PETITION FOR REVIEW DISMISSED.

JERRE S. WILLIAMS, Circuit Judge, with whom CLARK, Chief Judge, BROWN and GARZA, Circuit Judges, join, dissenting:

In this case, the Court regrettably retreats from a justifiable flexibility in the law to a rigid rule which disserves the interests of justice in the judicial review of the actions of an administrative agency. We recognized the importance of such flexibility in *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White,* 681 F.2d 275 (1982), and the panel opinion in this case followed *Ingalls* in turning its back on absolutism in such review. The Court overrules *Ingalls* and refuses to recognize that in the proper case the saving of time and cost to the litigants in judicial review should prevail over an unduly and unnecessary stringent application of the finality rule.

In this dissenting opinion I do not undertake to repeat in full detail the reasoning which led the majority of the panel to hold that there was a "final order" in this case. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree,* 698 F.2d 743, 746 (5th Cir. 1983). Instead, I emphasize briefly the actual factual situation in this case and relate it to the admittedly controlling concept of "finality". Under § 10 of the Longshoremen's and Harborworkers'

Compensation Act, 33 U.S.C. § 910 there is provision for alternative determination of the average weekly wages as a basis of calculating benefits for injured workers. Section 10(a) provides for calculation of benefits based upon the injured worker's own earnings if he has been employed in the same job for a year. Only if 10(a) cannot be applied is 10(b) applied. It provides for calculation of benefits based upon the wages of workers in comparable jobs for the past year. Only if 10(b) cannot be applied is 10(c) applied. Its method of calculation is based upon earnings potential of the employee rather than actual prior wages of the employee or of employees in comparable work.

In this case the Benefits Review Board found that 10(c) was applicable because it would not be "fair and equitable" for 10(b) to apply even though there were a number of welders in comparable employment whose average wages for the past year were readily available and were in evidence.

The sole ground which the Benefits Review Board gave for the abandonment of the progression from 10(a) to 10(b) to 10(c) was that the comparable employees had received a substantial wage increase during the preceding year. The panel decision found on the merits that this was not an adequate justification in the law for moving from the 10(b) calculation to the 10(c) calculation simply because it is almost universal for employees to receive a wage increase during the year, and the progression contemplated by Congress would be totally destroyed by the holding of the Benefits Review Board.

Why this brief description of the merits of the dispute in view of the fact that the issue before us is whether

the decision of the Benefits Review Board is appealable or not? The answer is to be found simply in the fact that without an understanding of the completeness of the decision by the panel of this Court on review from the Benefits Review Board can the justification for treating the decision of the Benefits Review Board as a final order be seen.

The critical point in this case is that the fundamental legal decision controlling the case has been made by the Benefits Review Board and is now on appeal to this Court. If we do not consider this issue as being presented to us in a "final order" the case will go back to the administrative law judge for further extensive proceedings based upon an interpretation of the statute which the panel of this Court found to be in clear contravention of the congressional policy. It is difficult to accept under these circumstances the "judicial economy" in the rigid rule which the majority here establishes.

The Supreme Court cases upon which the opinion for the Court relies most heavily are cases which are easily distinguishable and require the evaluation of wholly different considerations. They involve attempts to obtain judicial review of preliminary matters in administrative proceedings before the final decision on the merits is made. It is beyond cavil that allowing appeals in those kinds of cases promotes constant appeals to the Court, and would fail completely a test of judicial economy. Thus, in *Firestone Tire & Rubber Co. v. Risjord,* 440 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), the Court was asked to review a ruling on a motion to disqualify plaintiff's counsel in advance of trial.

The case of *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) is cited as

limiting the sweep of the seminal case of *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964). We relied strongly upon *Gillespie* both in *Ingalls* and in the panel opinion in this case. But *Coopers v. Lybrand* involved another preliminary matter—whether a class action should or should not be certified before trial on the merits. Both of these cases involved attempts to apply the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). That doctrine is not here involved. Further, both *Firestone* and *Coopers & Lybrand* are federal cases so they do not involve the distinction properly and painstakingly drawn by the majority of the Court in *American Export Lines, Inc. v. Alvez*, 444 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980) recognizing a broader concept of non-finality as nevertheless subject to federal judicial review in appeals from state courts. This issue, too, is not here involved.

The Supreme Court has not abandoned the key statement it made in *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). There the Court said that the question of finality deserves a "practical rather than a technical construction" because it would be "impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." While *Gillespie* itself involved a district court decision resolving an issue in advance of trial, the issue to be resolved was fundamental in that it sought to review the decision by the district court that the administratrix of decedent's estate could not bring suit on an unseaworthiness claim against a shipowner but could only bring suit under the

Jones Act. The Supreme Court held that the issue was properly reviewable, as the decision was a "final order."

Contrary to the conclusion in the opinion of the Court, our earlier decision in *Ingalls* is distinguishable from the case *sub judice* only in that *Ingalls* went further in recognizing an exception to a strict finality rule. What *Ingalls* decided was an interpretation of the law as to what agency within the administrative processes of the Longshoremen's and Harborworkers' Compensation Act had the authority to approve a compromise settlement. That decision clearly was not final in the sense that after it was made it was then left to that agency to decide whether or not to approve the compromise settlement in the case, a discretionary decision which would clearly be subject to additional review. In the case before us, in contrast, the core legal issue is over once the decision is made. As the panel opinion pointed out, all that was left was the ministerial act of taking the figures already in the record and calculating the average weekly wages based upon them.

While the majority of the Court mentions the possible additional issue of attorneys' fees, it properly does not draw any specific conclusions with respect to that issue once it is mentioned. Attorneys' fees can be part of the core of the case, requiring that they be set before a judgment is final. *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982). The award of attorneys' fees, on the other hand, can be a collateral matter independent of the merits of the case and uniquely separable from a cause of action. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 1166, 1167 n. 14, 71 L.Ed.2d 325 (1982);

Obin v. Dist. No. 9, Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574, 584 (8th Cir. 1981) ("[A] judgment on the merits of an action, otherwise final, is final for purposes of appeal notwithstanding that a claim for attorney's fees may remain to be decided.") Attorneys' fees clearly are collateral in the case before us.

Finally, it is not amiss to point out that the rules concerning finality and judicial review of administrative rulemaking make no fetish whatsoever of a principle that nothing more must remain to be done to have finality. *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 593, 101 S.Ct. 1266, 1273, 67 L.Ed.2d 521 (1981) (reviewing a "policy statement" of an agency without even discussing the issue of finality); *Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) ("the cases dealing with judicial review of administrative action have interpreted the 'finality' element in a pragmatic way.") Of course, I recognize the difference between administrative rulemaking and adjudication. But what is critical is that the rulemaking review cases accept a pragmatic approach to finality because the agency is declaring a fundamental governing legal rule. That is exactly the situation we have in the case which is before us, even though that principle or "rule" is being declared through adjudication. *Cf. Securities & Exchange Comm. v. Chenery Corp.,* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

This is not a case then in which a preliminary matter is being submitted to the Court for judicial review as in *Firestone* and *Coopers & Lybrand.* In this case a con-

trolling legal principle is submitted to the Court for judicial review leaving nothing but a routine application of that principle to be carried out on a record which is complete, as the panel decided the case. Even if the decision on the legal question were the other way, the record may be complete, and in any event is virtually so. Certainly, even under the BRB decision, less remains to be resolved than was the circumstance in *Ingalls Shipbuilding* where a serious decision on the merits concerning the approval of an agreed settlement remained to be decided.

It is my view that *Gillespie* is the law. *Ingalls Shipbuilding* was a proper application of *Gillespie* as a recognized narrow exception to a requirement that there must remain absolutely nothing to be done after the order is issued in the review of orders of administrative agencies. *Ingalls Shipbuilding* should not be overruled. It follows then that in the case before us we have a proper situation for application of the exception. Instead, we are compelled by the Court in its decision to force the parties to go back through the administrative process in ignorance of what this Court will decide is the controlling law of the case. This case does not call for nor open the door to "piecemeal" judicial review of administrative action. It calls for straightforward controlling judicial review of orders which are for all reasonable purposes final orders within the meaning of 33 U.S.C. § 921 and 28 U.S.C. § 1291.

The opinion for the Court sacrifices control by this Court over the concept of finality. It will substantially increase the expenditure of administrative and judicial services needlessly in that narrow class of cases such as *Gillespie, Ingalls,* and this case in which the Court can

readily perceive that its decision will resolve the fundamental legal issue about which the entire administrative appeal revolves. There is no reason to fear misuse of such expeditious resolution of core issues. We should not fear a "case by case" approach, recognized and accepted by the United States Supreme Court, when it is narrowly confined as here set out. We should not abdicate our judicial responsibility to dispose of pragmatically final orders in an expeditious fashion and with saving to all persons and agencies involved.

For these reasons I am compelled to dissent from the opinion of the Court.

APPENDIX B

NEWPARK SHIPBUILDING & REPAIR, INCORPORATED and American Home Assurance Company, Petitioners,

v.

James P. ROUNDTREE [sic] and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

No. 81-4308.

United States Court of Appeals, Fifth Circuit.

Feb. 22, 1983.

Employer appealed order of the benefits review board concerning claim for workers' compensation under Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) order was "final" even though administrative body had directed remand; (2) section of statute providing that compensation be determined by previous year's wages of employee was not applicable; and (3) section of statute which called for comparison to employee of same or most similar employment for determination of compensation was applicable.

Reversed and remanded.

Tate, Circuit Judge, filed a dissenting opinion.

Petition for Review of an Order of the Benefits Review Board.

Before GARZA, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

This appeal arises from a claim for workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. The employer urges that we find jurisdiction to lie in this appeal and that we rule on the proper statutory basis for computing compensation benefits under the facts presented. We find that jurisdiction does lie, and that § 10 (b) of the Act, 33 U.S.C. § 910(b), is the proper statutory basis by which to compute benefits in this case.

I. Background

James Roundtree has been a welder in the shipyards since 1941, and he worked as an independent contractor between 1954 and 1975. During the last days he worked as an independent contractor, he charged a rate of $12.50 per hour for his services. For a variety of personal and career-related reasons, Roundtree abandoned his work as an independent contractor and began working as an hourly employee for the firm now known as Newpark Shipbuilding. Roundtree's wage as a welder was $5.50 per hour, with available overtime and a ten cent per hour shift differential. Other welders in the shipyard were paid as much as $5.95 per hour at the time.

Roundtree's first day on the job, April 22, 1975, was an unfortunate one for him. He was working on a barge. While welding a hole that had been fitted and tacked,

Roundtree fell off his scaffold and injured his back, resulting in his disability. His claim for workers' compensation under LHWCA came before an Administrative Law Judge (ALJ) with the Office of Workers' Compensation Programs. The ALJ determined that Roundtree was entitled to compensation, and then considered the possible methods for computing Roundtree's average weekly wage pursuant to § 10 of the Act. The ALJ first considered § 10(a), which looks to the employee's wages during the prior year, and found that subsection inapplicable because of the change in Roundtree's employment from independent contractor to hourly employee. He then considered § 10(b), which looks to the prior year's wages of coworkers performing the same or similar work. The ALJ rejected that theory, in part because the shipyard workers had recently received a wage hike that would not be reflected fully in a $10(b) calculation based on twelve prior months. He therefore concluded that it would not be reflected fully in a § 10(b) calculation based on looked to § 10(c) for guidance. Section 10(c) points toward the earnings potential of the employee at the time of injury, rather than actual prior wages. Applying §10 (c), the ALJ looked at Roundtree's earnings capacity as an independent contractor and determined his weekly wage to be $360.41, approximately $10.29 per hour, based on Roundtree's earnings of $18,741.20 in the preceeding year. He then ordered compensation accordingly as provided in § 8(b).

Both Roundtree and his employer appealed to the Benefits Review Board (BRB). The employer argued that § 10(b) rather than § 10(c) should control. Roundtree cross-appealed to call for application of § 10(a), but apparently switched his view during the BRB proceed-

ings and agreed with the ALJ's application of § 10(c). The BRB affirmed the use of § 10(c) for determining the weekly wage, but ruled that the ALJ had erred in using the gross earnings of an independent contractor for determining the amount of Roundtree's weekly wage. The BRB suggested that the net earnings of an independent contractor, after business expense deductions, might be an appropriate wage determination. In any event the BRB remanded for a redetermination of Roundtree's weekly wage under § 10(c).

The employer appeals the BRB's ruling to this Court, pursuant to § 21(c) of the Act, 33 U.S.C. § 921(c). It argues that § 10(b) rather than § 10(c) should control this determination of average weekly wage. Further, it argues that the appeal is ripe for review as a "final order" because the record in this case is sufficiently complete. It urges that an appellate determination of this question will effectively terminate the litigation. Since our authority to review an administrative ruling under LHWCA is limited to "final orders", 33 U.S.C. § 921(c), we must begin by examining our jurisdiction over the subject matter of this case.

II. Examination of Subject Matter Jurisdiction

Appellate review of BRB orders is restricted under 33 U.S.C. § 921(c) to "final orders".[1] The "final order" requirement follows the contours of the finality rule ex-

1. 33 U.S.C. § 921(c) provides in part:
Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

pressed in 28 U.S.C. § 1291. *Director, Office of Workers' Compensation Programs v. Brodka,* 643 F.2d 159, 161 (3d Cir. 1981); *National Steel and Shipbuilding Co. v. Director, Office of Workers' Compensation Programs,* 626 F.2d 106, 107-08 (9th Cir. 1980). The requirement sometimes, but not always, excludes from appellate review a remand order to an administrative agency. *Id.* at 108; *United Fruit Co. v. Director, Office of Workers' Compensation Programs,* 546 F.2d 1224, 1225 (5th Cir. 1977). We believe, however, that the case before us is properly reviewable at this time even though the administrative body directed a remand.

Our determination of whether jurisdiction lies does not depend on a single formula or a simple rule. "The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171, 94 S.Ct. 2140, 2149, 40 L.Ed.2d 732 (1974), *quoting Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950).

This Circuit recently faced the question of what constitutes a final administrative order in a LHWCA case. In *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White,* 681 F.2d 275 (5th Cir. 1982), White and his employer entered into a compromise settlement of his LHWCA workers' compensation claim resulting from White's employment-based injury. An ALJ approved the settlement agreement after a cursory examination. The Director of the Office of Workers' Compensation Programs appealed the order of the ALJ to the Benefits Re-

view Board, which held that the Director had standing to challenge the settlement, and that the ALJ's approval of the settlement must be set aside. The BRB remanded the claim to the ALJ, and the employer appealed to this Circuit.

We noted first that considering the appeal would not raise the specter of piecemeal review before the court, *id.* at 279, because the record was complete, the legal conclusions had been made, and the issue on appeal was only whether the power of the ALJ had been exercised properly. Reaching the merits effectively eliminated the need for later review, while dismissal would only have caused the same legal issue to come before us after the agency held additional hearings based on its tentative interpretation of its role. We therefore recognized jurisdiction.

[1] Similarly in the case before us today, the issue presented challenges the proper legal standard, rather than constitutes a factual dispute. The record itself is factually complete, and application of § 10(b) can be accomplished on the record. The only question presented is that of ruling on the proper formula.

If we were to dismiss for lack of jurisdiction, the next proceeding would be the ALJ's application of § 10(c) to the record and a pronouncement of a definite monetary award. If applying § 10(c) is not supported in the law, that proceeding would be a wasted one. If, however, we were to defer our review and determine at a later date that there is *no* error, we would have little effect on the risk of piecemeal review but merely would delay the resolution of the dispositive issue in the case. No party has raised any other issues on appeal, and there is little

risk of a new appellate issue developing in the proceedings to come.

With our decision today, the remaining issues will not be questions of law but merely the largely ministerial job of applying the law to the preexisting record. This task is properly left to the sound discretion of the administrative body. Obviously our decision would be definitive guidance to the agency. Hence, we believe that the order of the BRB is ripe for review.

We recognize that cases in this and other Circuits have denied appellate review of pending actions from the BRB. But these cases involved incomplete determinations or administrative records, thus placing them in a less "final" posture than *Ingalls* or the immediate case. In *United Fruit Co. v. Director, Office of Workers' Compensation Programs, supra,* we dismissed the appeal as untimely. The unresolved issues were more than a simple calculation of disability benefits; the ALJ had not properly ruled on the nature and extent of the employee's disability, or the "possible liability of the special second injury fund." In *Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, United States Dep't of Labor,* 535 F.2d 758 (3d Cir. 1976), (per curiam) the court dismissed the appeal, because, even though liability had been decided, the extent of disability due to the worker's loss of hearing remained undetermined. In *Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs,* 590 F.2d 1267 (4th Cir. 1978) (per curiam), the ALJ had not made complete findings as to "the nature of the injury, the degree of physical impairment . . . and any other factor . . . including the effect of disability as it may naturally extend into the future." *Id.* at 1269,

quoting 33 U.S.C. § 908(h). All these cases, unlike the case before us, had unresolved factual determinations that appellate review could not settle.

The Director of the Office of Workers' Compensation Programs (Director), respondent in this case, offers a different argument in urging a narrow construction of the term "final order". He presses an analogy to attorneys' fees cases, where courts have held that an order is not final, hence not appealable, until the amount of awarded attorneys' fees is determined. Since, in the case before us, the determination of disability is known but the dollar amount of the award must still be set, the Director urges that the same principles of lack of finality apply in this case as in the attorneys' fees cases.

In *Director, Office of Workers' Compensation Programs v. Brodka,* 643 F.2d 159 (3d Cir. 1981), the Third Circuit held that a LHWCA case is not yet final when the substantive claim and the availability of attorneys' fees are both settled but the amount of the attorneys' fees award is undetermined. Similarly, in *Croker v. Boeing Co. (Vertol Division),* 662 F.2d 975 (3d Cir. 1981) (en banc), the court determined that a district court order is not final for purposes of 28 U.S.C.A. § 1291 until the amount of attorneys' fees has been settled. This Court has held similarly. *E.g. Williams v. Ezell,* 531 F.2d 1261, 1263 (5th Cir. 1976).

We acknowledge that an order is not "final" under 28 U.S.C. § 1291 until the amount of awarded attorneys' fees has been determined. However, we find those cases distinguishable. In the attorneys' fees cases, the applicable legal standard is already established when the district court rules on the award. There need be no appeal

at that time regarding what the law ought to be for the determination. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (Title VII case, 42 U.S.C. § 2000e et seq., establishing a twelve-pronged test in awarding attorneys' fees). But at that point, the record would not yet contain the factual material needed to rule on the amount of the award. The case before us, by contrast, already contains uncontested full factual findings.[2]

Furthermore, these cases usually come before an appellate court with challenges to both the merits and the award of attorneys' fees. To hold an order to be final before the final award of attorneys' fees would only lead to two appeals, one on the merits and one on the attorneys' fees, with no corresponding increase in the fundamental fairness to the parties. Such is not the case here.[3]

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2. Judge Tate, in his dissent, expresses his belief that the factual findings in the record may not be complete. Yet we find the record to contain clear and ample evidence of Rountree's earnings history, the earnings records of his co-workers, and all other necessary information concerning the wages of Newpark's welders. The task of applying § 10(b) to the existing record will be ministerial in nature. The case before us does not require us to determine whether the application of § 10(c) would also be ministerial in nature, hence we need not speculate as to whether the BRB's order would be final, hence reviewable, if § 10(c) rather than § 10(b) were the proper formula.

3. We recognize that some unresolved collateral issues may remain in the instant case as presented in this appeal. Rountree, for example, has requested attorneys' fees stemming from the prior hearing before the ALJ. However, these issues are substantially unrelated to the heart of this appeal and therefore do not bar our jurisdiction to consider the central issue. "When attorney's fees are similar to costs or collateral to an action, a lack of determination as to the amount does not preclude the issuance of a final, appealable judgment on the merits." *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143, 1146 (5th Cir. 1982) (citations omitted).

The Supreme Court has stated that the question of finality deserves a "practical rather than a technical construction" because it would be "impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964) (exceptions to finality rule under 28 U.S.C. § 1291). In the case before us, the question on appeal is to determine the proper legal standard to be applied. Our decision will settle this question and minimize the risk of a wasted agency hearing and a later appeal. We find that an appeal at this stage in this case will be more efficient and will not prejudice the parties, especially since the employee's workers' compensation checks will not reflect the proper award until the conclusion of this litigation. Accordingly, we recognize appellate jurisdiction in this case where the substantive legal issue is clearly posed and all that will remain after it is decided is use of the record already completed to calculate the wage base for the recovery.

III. Determination of the Proper Legal Standard

A. General Considerations

The substantive dispute before us is not a complex one. We must decide which of three statutory formulas is to be used in computing Roundtree's weekly wage base for purposes of workers' compensation benefits under LHWCA. Roundtree's somewhat unusual situation, having changed on the very day of his injury from independent contractor at $12.50 per hour to hourly employee at $5.50 per hour makes the method of computation an issue of intense concern to the parties.

[2] Our standard of review is necessarily limited, *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976), to whether the administrative findings are supported by substantial evidence, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L.Ed.2d 30 (1968), in accord with the law, *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947), and not arbitrary, *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 85 S.Ct. 1012, 13 L.Ed.2d 895 (1965) (per curiam).

The nature of our review is also restricted by the statutory scheme of § 10. The statute assumes that most workers will fall into subsection (a), which looks to the actual wages of the injured worker in the year prior to the injury as the monetary base for determination of the amount of compensation. Subsection (b) operates only where subsection (a) cannot be applied due to a fundamental change in the nature of the injured worker's employment. Method (b) looks to the actual wages of other workers in the same employment situation. The statute presumes that either (a) or (b) will fit the circumstances of the injured employee in most cases, but adds the "earnings capacity" formula of subsection (c) as a general, "catch-all" provision in case the other methods cannot be used as, for example, where the employee has worked for substantially less than a year and there are no other employees in the particular business whose jobs are comparable. Our task, then, is not to choose the most attractive method, but to determine which of the formulas is called for by the step-by-step statutory scheme.

B. Specific Determination

[3] Roundtree urges on appeal, as he has in the proceedings below, that § 10(a) of the Act controls. Basically, § 10(a) relies on the actual wages of the injured employee during the previous year.[4] Roundtree was earning between $10.50 and $12.50 per hour during the previous year as an independent contractor.

However, we agree with both the ALJ and the BRB that § 10(a) is not a proper formula to be applied in this case. Roundtree had a complete change in the nature of his employment when he voluntarily relinquished his self-employment as independent contractor and accepted an hourly job in the shipyard. This change was not a simple change in employer or place of business. Job-hoppers performing substantially the same work for different employers are covered by the 10(a) formula just as are their less peripatetic coworkers. But Roundtree's situation is much further removed from 10(a) applicability.

First of all, his prior work as an independent contractor was not "covered employment" under workers' compensation, since he was self-employed. Under § 10(a) he had *no* employer. Further, Roundtree's new position required only the skills of a welder, while his work as a contractor,

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4. Section 10(a) of the Act, 33 U.S.C. § 910(a), provides:
If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

as the ALJ found, entailed "a considerable amount of expenses involved in operating his own business such as purchasing oxygen, welding rods, hand tools, acetylene, a welding rig mounted to his truck, insurance coverage, as well as various utility expenses." Self-employment also requires a knowledge of bookkeeping, contracts, and government regulations that an hourly job does not demand. Finally, an independent contractor works on a job basis and may well not be working a full 40 hour week every week. These critical distinctions explain, at least in part, why workers like Roundtree would trade a $12.50 an hour contractor's life for a $5.50 guaranteed wage. Since Roundtree was not "employed" for the year prior to the accident, he was not working in the same employment on the day of the accident, and § 10(a) is not applicable.

The employer contends that § 10(b) is the proper formula. Subsection (b) determines a weekly wage by counting the last year's wages of coworkers performing substantially the same work at the same place of employment as the injured worker.[5] This subsection applies.

> to claims in which the injured worker has had too little time on the job to permit an accurate and fair computation of average daily wage: for example, the subsection would apply if a worker had been

5. Section 10(b) provides:

If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

> recently hired after having been unemployed, or out of the work force, or in a lower paying position. *See O'Hearne v. Maryland Casualty,* 177 F.2d [979] at 982; *California Ship Service Co. v. Pillsbury,* 175 F.2d [873] at 876.

Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 686 F.2d 1336, 1341-42 (9th Cir. 1982).

[4] The record shows that the employer presented pay records of three welders who performed comparable work at the same site. This is an adequate statistical base for § 10(b) purposes, even though there were over 100 welders in the shipyard at the time. There was no attempt to introduce any evidence that these three were not doing comparable work and instead were picked as the lowest-earning welders. Absent such an intent to distort the comparable wages, even one worker's pay record could fulfill the statutory requirement.[6]

The Director counters the claim of § 10(b) applicability by pointing out that § 10(b) should not be used when the result would fail "reasonably and fairly" to represent the worker's earnings. The Director urges us to uphold the application of § 10(c).[7]

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6. The statute calls for comparison to "*an* employee of the same or most similar employment." *See id. See also Andrew F. Mahony Co. v. Marshall,* 56 F.2d 74 (9th Cir. 1932).

7. Section 10(c) states:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment

The Director points out that the welders in this shipyard received a 50 cent per hour wage increase just two months before Roundtree's accident. Examining ten months of older, lower wages with only two months of the then-current wages would diminish Roundtree's compensation base. Since the purpose of the overall statute is to compensate the injured worker, the Director argues, the government should take all possible steps to provide the employee with the maximum recovery allowable under the statute. Hence, he urges us to affirm the BRB's use of § 10(c).

[5] We are sympathetic to the Director's view that claimants should receive the maximum compensation allowable under the statute. However, we find that an award under § 10(c) is not allowable under the statute in the case before us, and we hold that § 10(b) is the applicable formula.

First, we point out that the statutory hierarchy of compensation formulas will allow the use of § 10(c) only when neither § 10(a) or § 10(b) can be applied "fairly and reasonably". The Director argues that any substantial wage increase within the year preceding injury would make § 10(a) or § 10(b) unfair, and that the larger the raise and the closer to the date of injury, the more unfair the other methods become. He believes that any worker whose employer gave a substantial raise before the date of injury should be able to claim a § 10(c) "catch-all" computation, whether or not that worker has been employed there for the entire previous year.

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in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Yet such an interpretation is not in keeping with the intent of the statute, for it would effectively eradicate virtually all applications of methods (a) or (b). Most employers now offer some sort of annual wage boost. Congress, in creating this statutory scheme, did not intend for § 10(a) and § 10(b) to be wiped off the books. The "catch-all" provision of § 10(c) is properly to be applied only in cases where it would be unrealistic to apply the normal formulas. As legislative history describes § 10(c):

> This subsection in the present law is used where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work. . . . Thus, subsection (c) applies to seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek.

Senate Rep. No. 1315, 80th Cong., 2d Sess., *reprinted in* [1948] U.S. Code Cong. Serv. 1979, 1982, *quoted in Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 575 (7th Cir. 1980).

Case law clarifies the limited nature of § 10(c). In *Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176 (9th Cir. 1976), the court upheld the use of § 10(c) when "*no evidence* was introduced which could clearly determine the claimant's average daily wage" under § 10(a) or § 10(b). *Id.* at 1179 (emphasis added). The Ninth Circuit also stated in *Palacios v. Campbell Industries*, 633 F.2d 840, 842 (9th Cir. 1980) that "[s]ection 10(c) applies to intermittent and irregular employment, when application of the mathematical formulas provided in section 10(a) or 10(b) would be unreasonable or unfair, or when insuf-

ficient evidence is presented at the hearing to permit proper application of section 10(a) or (b)."

On occasion, some courts have recognized a general unfairness in using § 10(a) or § 10(b) when those formulas would not reflect a claimant's earning capacity at the time of injury. These cases usually involve a worker who had been off the job for much of the preceding year, so that a § 10(a) determination of wages while working would lead to a significantly larger computed wage base than the worker's actual earnings during the prior year. In *Strand v. Hansen Seaway Service, Ltd., supra,* the Seventh Circuit found that where a cold water port is normally closed for fixed times of year, the use of § 10 (a) or § 10(b) to determine an average weekly wage would be unreasonable and unfair. In *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs,* 686 F.2d 1336 (9th Cir. 1982), the Ninth Circuit upheld the use of § 10(c). The court admitted that use of § 10(c) might be error, but refused to reverse because the use of § 10(a) would have inflated the worker's wage base unfairly. *See also Johnson v. Britton,* 290 F.2d 355 (D.C. Cir.), *cert. denied,* 368 U.S. 859, 82 S.Ct. 99, 7 L.Ed.2d 56 (1961) (§ 10(a) would result in a "highly distorted earnings figure" when the worker worked only 180 days of the prior 52 weeks).

In *Andrew F. Mahony Co. v. Marshall,* 56 F.2d 74 (9th Cir. 1932), the court sanctioned the use of § 10(c) to an intermittent employee. Winkler, the employee, had earned $1,266.20 in the year prior to his injury, and was awarded the maximum $25.00 weekly compensation, based on the higher wages of a coworker. Recognizing that § 10(b) would provide greater compensation to Winkler than he had earned through his prior, intermit-

tent employment, the court allowed the use of § 10(c). The court stated that § 10 "does not provide that every case must be measured by subdivisions (a) or (b) if it is possible to force the transaction into the formula which those subdivisions prescribe and that subdivision (c) is to be applied only to cases which cannot be measured by (a) or (b)." *Id.* at 78. However, the use of subsection (b) in the case before us does not require forcing or even a gentle push. It is method (c) that calls for the push—a push that would give Roundtree the benefit of the recent raise in the shipyard.

It is the clear intent of the statute that if one of Roundtree's co-workers was injured and he had worked for the whole of the preceding year, § 10(a) would apply. When this was pointed out to government counsel during oral argument, counsel was forced to take the position that any welder in the shipyard who was injured should be able to claim a wage base calculated under § 10(c). We cannot accept such a departure from the manifest statutory scheme. We hold that § 10(b) is the applicable formula by which to compute Roundtree's wage base.

IV. Conclusion

We find that this Court has jurisdiction over the subject matter of this appeal. Further, we hold that § 10(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 910(b), sets out the proper formula by which to determine Roundtree's workers compensation benefits. We therefore reverse the Benefits Review Board and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

TATE, Circuit Judge, dissenting:

With respect for my brethren of the majority, I nevertheless dissent from their holding that the present order of remand by the Benefits Board of Review is a *"final* order" and, thus, subject to judicial review at this time. 33 U.S.C. § 921(c). In a commendable effort to expedite judicial review in the present case, the majority has adopted a principle of case-by-case determination of "finality" that will, however, unsettle the relative certainty that was previously attached to that concept. While the benefits of expeditious review in the *present case* may be apparent, the general rule enunciated will require, as its consequence, many premature appeals in the future and much additional resultant delay before the final award or rejection of compensation claims.

In the present case, the principal (but not the only) issue before the Administrative Law Judge and the Board was whether the injured employees should be awarded compensation based upon § 10(a) (the employee's wages during the prior year), or upon § 10(b) (prior years' wages of coworkers), or upon § 10(c) (an alternative, when either of the former methods "cannot reasonably be applied" to arrive at the annual earnings of the injured employee) of the Act, 33 U.S.C. § 910(a), (b), or (c). Affirming the ALJ, the Board held that § 10(c) applied to the facts of this case, but it remanded for additional findings of fact, with leave to reopen the record to take additional evidence, for a redetermination of the claimant's weekly wage, as well as for consideration of other issues, such as attorney's fees. Independent of whether we ultimately decide whether the Board was correct in finding § 10(c) to provide the proper method for com-

puting the award of compensation,[1] we must first decide whether this order was "final" so as to permit us to exercise appellate jurisdiction to review it.

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1. Here, for instance, the majority decides that instead, § 10(b) is the proper formula, so that more efficient non-piecemeal review is appropriate. However, had the majority decided that the Board correctly applied § 10(c), the result of the majority rationale would permit (or require, see text below) *two* judicial reviews of the same award—the first (the present) as to the *method* of calculating the compensation benefits, and the second, if one of the parties disagreed as to the *actual* dollar rate of the actual award or as to the attorney's fees or other remaining issues in the case.

I may add that I entertain very serious reservations as to the correctness of the majority's conclusion that the Board improperly used § 10(c) under the Board's determination that neither § 10(a) nor § 10(b) provided a reasonable and fair method of determining the "annual earning *capacity*", § 10(c), of this particular employee, injured on the first day of his new employment after having left much more highly remunerative work of the same nature. *Cf. also* § 8(h), defining "wage-earning capacity" and providing that "actual earnings" measure if they "fairly and reasonably represent his earning capacity."

I read § 10(c) as a Congressional grant of administrative discretion, subject to review only as an abuse, to determine the annual earning capacity of an injured employee where § 10(a) and § 10(b) do not reasonably and fairly result in a calculation of the annual earning capacity of the particular employee injured. *See*, to same effect, 1A Benedict on Admiralty, § 74 at pp. 4-41 through 44 (7th ed. 1982). Thus, § 10(a) and § 10(b) were not legislatively intended to be a statutory straight jacket mechanically applied. In the present case, had the claimant Roundtree worked for the present employer (instead of for himself, doing the same type of work) for the preceding year, it would be obvious that his previous year's earning capacity and annual wages were greater than those of his present co-employees who had worked "in the same or in similar employment in the same or a neighboring place", § 10(b), during the preceding year (upon which compensation is based, rather than on the increased pay such employees were now paid during the year of Roundtree's injury). In terms, § 10(b) seems addressed to an injured employee who had not worked for the employer defendant "during substantially the whole of such [preceding] year," in which event his average annual wage is calculated as if he had worked the whole rather than only part of the year for that employer. However, since I do not believe we have jurisdiction to review this interlocutory order of the Board, I will comment no further as to the majority's ruling on the merits.

The majority notes, correctly, the settled jurisprudence to the effect that the "final order" appealability-requirement of 33 U.S.C. § 921(c), with regard to Board decisions, is essentially determined by the same criteria that apply to the "final judgments" appealability-requirement of 28 U.S.C. § 1291 with regard to district court decisions.[2] As to the latter, the Supreme Court recently reiterated the test of finality as being " 'a decision by the District Court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." ' " *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). The Court emphasized several of the important purposes served by the requirement of finality: the avoidance of piecemeal appeals and of the obstruction to just claims by permitting a succession of separate appeals from the various rulings to which litigation may give rise, as well as the promotion of efficient judicial administration. *Id.* As this court itself has reiterated,

> [The finality] requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a de-

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2. Particular requirements of an administrative review scheme may sometimes impose "special considerations" on the determination of finality that vary from the "classical jurisdictional requirements" applied to appeals from district courts. *Sun Shipbuilding and Dry Dock Company v. Benefits Review Board*, 535 F.2d 758, 760 (3d Cir. 1976), *see Weinberger v. Salfi*, 426 U.S. 749, 764-67, 95 S.Ct. 2457, 2566-67, 45 L.Ed.2d 522 (1975). No such particular requirements or special considerations are relied upon or appear with regard to the present clearly delineated administrative and judicial review scheme.

> parture from this requirement of finality for federal appellate jurisdiction.

In re Corrugated Container Antitrust Litigation, 611 F.2d 86, 89 (5th Cir. 1980).

The present Board order, although determining a central issue of the claim—the method of calculating weekly compensation due—, remanded the proceedings to the Administrative Law Judge for further findings as to the actual weekly rate to be awarded and as to attorney's fees. It did not end the litigation on the merits, and no final administrative order awarding weekly compensation and attorney's fees would be entered until after the remand.

Under such circumstances, where in effect a central issue of liability has been determined to administrative finality by the Board but remand is ordered to calculate and make a specific monetary award, the decisions until the present have uniformly refused to consider the Board order of liability as "final" for purposes of judicial reviewability at that time, both in this circuit, *United Fruit Company v. Director, Office of Workers' Compensation Programs,* 546 F.2d 1224 (5th Cir. 1977), and in other circuits, *Director, Office of Workers' Compensation Programs v. Brodka,* 643 F.2d 159 (3d Cir. 1981); *National Steel and Shipbuilding Company v. Director, Office of Workers' Compensation Programs,* 626 F.2d 106 (9th Cir. 1980); *Newport News Shipbuilding Corporation v. Director, Office of Workers' Compensation Programs,* 590 F.2d 1267 (4th Cir. 1978). As stated in one of the lead decisions applying this rule, "[i]t is a well-established rule of appellate jurisdiction . . . that where liability has been decided but the extent of damages remains undetermined,

there is no final order." *Sun Shipbuilding & Dry Dock Company v. Benefits Review Board,* 535 F.2d 758, 760 (3d Cir. 1976).

The virtues of this rule are apparent. It avoids dual appeals on both liability and award, with the consequent doubled judicial appellate delays, in favor of a single review of the final administrative award. An injured worker, whose award is vacated by the Board for recalculation as to the properly exact amount of weekly compensation due, does not suffer the prolonged denial of compensation that will occur as his employer seeks judicial review of the singled issue of liability (which, moreover, in the preponderant number of cases will be affirmed) decided by a Board opinion that affirms liability but vacates and remands for exact calculation. The certainty of the rule of nonfinality in such instances permits all parties to rely on judicial review only after administrative remand and final calculation of the actual award, without being forced to take a precautionary appeal to the courts lest a failure to do so result in the loss of judicial review of the liability issue as determined by the Board's remand order, if it is subsequently characterized as "final" as to the liability decision.

In failing to follow this (until now) well-settled jurisprudential rule, the majority analyzes the facts and issues of this particular case, and decides that because in this particular case the appellate court decision now will determine the proper legal standard to be applied on the remand, and minimize the risk of a wasted agency hearing and later appeal, an appeal at this stage of the proceedings in this case will be more efficient and will not prejudice the parties (because the proper award of com-

pensation cannot be made until the conclusion of the litigation). The majority concludes that we will "recognize appellate jurisdiction *in this case* where [1] the substantive legal issue is clearly posed and [2] all that will remain after it is decided is use of the record already completed to calculate the wage base for recovery."

Before noting some of the practical consequences to this newly created exception from the "finality" requirement for reviewability of administrative orders, I point out the tenuous authority upon which creation of this exception is based. Unlike all of the previously cited decisions, the majority does not advert to the traditional and quite limited exceptions to the finality rule rarely permitted. *See, e.g., Brodka, supra,* 643 F.2d at 163 & n. 9 (collateral order final in nature and severable from merits; irreparable injury; unresolved issues purely ministerial in nature); 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure, § 3942, see esp. at p. 314 (1977); 15 Wright, Miller and Cooper, Federal Practice and Procedure, § 1910-13 (1976). Rather, the majority purports to find in *Ingalls Shipbuilding Division v. White,* 681 F.2d 275 (1982), a rather free-wheeling authority to dispense with the finality requirement in any individual case where the spectre of piecemeal review is not raised because in a given case the record is complete, the issue presented is a legal standard rather than a factual dispute, and the same legal issue (perhaps incorrectly decided initially by the Board) would recur on the subsequent resort to judicial review after the remand.

Ingalls, however, is a case presenting exceptional and distinguishable facts. The sole issue there concerned whether an administrative law judge had the power to

approve a settlement, with an important collateral question as to the reviewability or not of a settlement so approved, as against contentions (ultimately upheld by us) that the judge was without authority to do so and that the Director, Office of Workers' Compensation Programs, *did* have standing to appeal the ALJ's order approving the compromise. The Board had upheld such power in the ALJ, but had remanded for his reconsideration of certain factors. Balancing competing considerations of piecemeal review and the danger of denying justice by delay in the decision of this crucial issue in the administration of the compensation act, *Ingalls* concluded that "the facts *here* fall within the *unique situation* that is established as an exception to technical finality in *Gillespie* [*v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).]" 681 F.2d at 279 (emphasis added).

Ingalls did not explicitly specify the unique and exceptional facts. However, its reference to *Gillespie*—where, as in *Ingalls,* there was a close or at least unresolved issue as to the appealability itself of the basic order (in *Ingalls,* on whether *any* order of an ALJ approving a settlement was reviewable at the instance of the Director)—would indicate to me that no blanket exception to finality was intended whenever, in a panel's view, the spectre of piecemeal review was not raised by deciding the initial appeal. That the "pragmatic finality" exception to finality recognized by *Gillespie* applies only in extremely limited and extraordinary circumstances may be recognized by the Supreme Court's recent characterization of that decision's holding:

> In *Gillespie,* the Court upheld an exercise of appellate jurisdiction of what it considered a margin-

> ally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably 'implemented the same policy Congress sought to promote in § 1292(b),' *id.*, at 154, 85 S.Ct. at 312, and the arguable finality issue had not been presented to this Court until argument on the merits, thereby ensuring that none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided.

Cooper & Lybrand v. Livesay, 437 U.S. 463, 477 n. 30, 98 S.Ct. 2454, 2462 n. 30, 57 L.Ed.2d 351 (1978).

The present petition for judicial review of a Board order presents no unusual or unique circumstances such as are implicated in *Gillespie* or in the quite limited exceptions to finality previously recognized. Absent the present decision by the majority, there was no issue of marginal appealability that justified this court's immediate determination of the appealability issue and of the correctness of the underlying order. The issue decided, although important, is not of such national significance to the administration of the Act as to require its decision on this (premature) appeal rather than by the appeal from the final order that awards compensation and resolves all unsettled issues. Nor, for reasons to be set forth, does the new general exception to finality created by the majority avoid thwarting the purposes of the finality rule.

Rather, by importing into the finality concept a case-by-case measure of exception, in general application the newly created judicial exception substantially impedes these purposes of the finality concept and must inevitably result in multiple appeals, additional delays before final decision, and new issues of appellate jurisdiction that

will impede the decision by judicial review of the merits of administrative orders. This may be illustrated by reference to the present proceedings.

The majority's exception permits immediate reviewability, despite technical non-finality, where the record is complete as to factual matters and where only a legal standard is at issue, immediate decision of which will facilitate the ultimate decision after remand. With regard to the present case, I note:

1. The majority assumes the record is complete, probably subconsciously influenced by its ultimate determination that § 10(c) does not apply and that the record now contains all facts needed to decide under § 10(b). Absent that determination, the record is *not* complete, as the Board recognized in vacating and remanding for additional findings of fact, including the taking of evidence if necessary, to make a proper weekly award under § 10(c). If we had *affirmed* (instead of reversed) the Board's determination that § 10(c) furnishes the proper measure of weekly disability compensation, the effect of our decision retaining appellate jurisdiction would be to remand (as the Board ordered on June 10, 1981, some eighteen months ago) to the Administrative Law Judge to calculate the weekly award, following which the employer (or the claimant) would be entitled once again to appeal this now-final order. Whether the majority had affirmed or reversed the Board's non-final order, however, in either event the majority's new exception rule builds into the administrative compensation-awarding processes an additional delay, in this case extending more than a year and a half (so far), by allowing an initial appeal as to the liability-standard, to be followed (quite pos-

sibly) by yet a second resort to the review process after, on remand, the ALJ fixes the rate of compensation and decides the subsidiary undecided issues, such as attorney's fees.

2. The employer sought judicial review of the Board's remand order, until now considered a non-reviewable non-final order. Assume that instead the parties had followed the previously accepted methodology, applying for judicial review only after a final order, and thus had complied with the remand and secured an expeditious administrative determination of unresolved issues, including the compensation, to be incorporated in a technically as well as actually final order. Upon judicial review from the true final order, the parties are faced with the possibility that, under the majority's new "pragmatic finality" exception, their failure to appeal the initial "final" order (determining only the standard of liability) forecloses subsequent review of the initial liability decision.[3] What

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3. This type of problem is illustrated by *Croker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981) (en banc). The district court entered judgment on the merits against the defendant in October 1979, leaving for determination only the amount of attorney's fees. In March 1980, the district court set the amount of attorney's fees, and the employees timely appealed within thirty days of the latter order. The defendant moved to dismiss the appeal by the plaintiffs as to certain merit-rulings in the October 1979 judgment. The defendant contended that the 1979 judgment was final, since it had decided all issues in the appeal. The court of appeals rejected this contention, holding that the 1979 judgment was not "final" under the general test that it did not terminate the litigation and leave nothing to be done to enforce the judgment.

The majority, rather unsuccessfully in my view, distinguishes this decision and numerous others to same effect by noting that the record at the time of the initial order did not contain all the factual matter necessary for the final determination of the amount of attorney's fees, so the initial order was not 'final" and was not reviewable at that time. I am unable to see how the present record differs—even aside from the lack of complete evidence to decide the § 10(c) issue. In

must the parties do to avoid this possibility? Obviously, to avoid this possibility, a party must seek initial review of the initial Board remand-order, although it involves considerable additional appellate delays (here, eighteen months so far), and although the court may decide that, after all, the appeal is premature because the order is not "final" under the flexible finality rule envisioned by the majority's new exception.

3. If the previously accepted concept of "finality" for purposes of judicial review had been followed in this case, then on the single judicial review the courts would be concerned only with the merits of the litigation. (If a party appealed despite the accepted rule, the usual practice in this court would probably result in a dismissal by summary order of an administrative panel, since the rule of finality previously followed was certain and was easily administerable.) Under the new rule of appealability sanctioned by the majority, a new adjective issue of appealability is injected into every appeal from a Board remand-order or from an order by the Board following an unappealed Board remand-order.[4] Is or was the initial

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the present case also, there was not a complete factual record necessary to fix the amount of attorney's fees due, an issue that the Board had remanded to the ALJ. This circumstance may indicate some of the difficulty and uncertainty in determining whether there is a "complete record" so as to permit a reviewing court to consider the order under review as "final".

Perhaps some of the obvious possibilities of injustice and the necessity for precautionary appeal could be avoided by holding that, when an appeal *is* perfected, the order may be pragmatically "final" enough to be reviewable, but that a failure to appeal at that time will not preclude subsequent review of the technically (and actually) "final" order. However, such flexible interpretation would thwart the purposes of the finality concept, aside from raising fundamental issues of judicial disregard of the legislative final-order basis of appellate jurisdiction.

4. See note 3 *supra*.

order "pragmatically" final? This will involve individual analysis in each case to determine whether where what the Board decided was a "legal standard" (instead of the factual application of a legal standard, a mixed law-fact question, for example) and whether the initial record was "complete" such that immediate judicial review of the initial order would add to the efficiency of disposition and would theoretically avoid the spectre of piecemeal judicial review. To replace the former certain definition of administrative finality, the majority substitutes a rule that requires case-by-case analysis in each individual appeal, that in many instances will result in the prolongation of judicial review by the frequent necessity of oral argument and collegiate interchange as to the variables now injected into this adjective issue of appealability per se—and one as to the application of which, I predict, reasonable appellate minds will differ. For the previously certain rule of "technical" as well as actual finality, the majority substitutes a flexible "pragmatic" finality rule of uncertain case-by-case application that must inevitably encourage precautionary interlocutory appeals, and their consequent delay, and that may in an appreciable number of cases delay the decision of the merits by injecting a complicated threshold adjective issue of appealability.

4. And what about the claimant (such as poor Roundtree, here), as the reviewing court entertains the initial appeal as to the legal standard of liability, despite a remand by the Board to calculate the weekly compensation. Here, back in June 1981, the Board *vacated* the provision of the order of the Administrative Law Judge awarding Roundtree a weekly compensation award, see Record Excerpts, p. 43, and remanded to that judge for him to make further findings and to take further evidence,

if necessary, in order to calculate the proper weekly amount. We are informed that here the employer has continued to pay the claimant weekly compensation.

However, when the Board vacates the only order that requires an employer to pay weekly compensation, then —in the absence of a subsequent order by the administrative judge on the remand renewing the employer's obligation to pay weekly compensation—I would suppose that, as the Director in brief suggests, it is at least arguable whether the employer *was* obliged to continue to make compensation payments to its disabled employee before there was an administrative order fixing their actual amount. Should in such circumstances an employer terminate weekly compensation until an order as to its weekly amount is finally issued, the availability of interlocutory review of the Board's remand order (deciding the measure of liability, but remanding for calculation of the amount due) will add a considerable period of delay during which the disabled employee will receive no weekly compensation (here, more than eighteen months, so far), solely for the purpose of judicial review of the Board's interlocutory order. Only following conclusion of that interim lengthy judicial review of the measure-of-liability portion of the Board's remand-order, will the proceedings finally be remanded to the Administrative Law Judge to issue an order awarding weekly compensation in calculated amount—as would have occurred, absent interim judicial review, many months earlier. I cannot believe that either the purposes or intent of the compensation act are served by an interpretation of the judicially-reviewable "finality" provision of 33 U.S.C. § 921(c), that will insert such additional interlocutory-review delays that may disrupt for an appreciable time the continued payment of weekly

compensation to an admittedly disabled employee solely for the purpose of affording interlocutory judicial review.

I sympathize with my brothers of the majority in their commendable desire to decide *now* a central issue of this proceeding, since the appeal is already here, because *in this case* they view it to be more efficient to do so, under the particular issue and record presented to us. I share their general view that formal procedural rules should be applied in the light of their function, and that a practical rather than a technical construction is often suitable to advance the end purpose of a procedural rule. Here, however, the very purpose of the finality rule is thwarted by the practical construction accorded it; although it may advance the efficient decision of this particular case, the flexible rule of pragmatic finality adopted by the majority will impede the efficient and expeditious decisions of many, many appeals from administrative remand-orders in the future. At the same time, the newly created exception to finality replaces with large elements of uncertain administration the previously certain and efficient rule of finality as accorded to Board orders. The need for clear and easily administered rules as to the threshold adjective issue of reviewability overrides any values of flexible case-by-case administration. As has been stated in a related context:

> Although well-established rules of appealability might at times cause an action to be determined unjustly, slowly, and expensively, they have nonetheless the great virtue of forestalling the delay, harassment, expense, and duplication that could result from multiple or ill-timed appeals. The great value of the final judgment rule may well be that it combines generally effective review with guides sufficiently

> clear to prevent most of the great waste that could result from protective appeals and litigation over appellate jurisdiction. Earnest pursuit of a "practical approach" could quickly destroy this accomplishment.

15 Wright, Miller, and Cooper, *supra,* § 3913 at p. 523.

I therefore must respectfully dissent from the majority's opinion.

APPENDIX C

BENEFITS REVIEW BOARD
U. S. DEPARTMENT OF LABOR

No. 80-158 & 80-158A

JAMES P. ROUNTREE,
Claimant-Respondent Cross Petitioner

v.

NEWPARK SHIPBUILDING & REPAIR, INCORPORATED
and
AMERICAN HOME ASSURANCE COMPANY
Employer/Carrier-Petitioners Cross-Respondents

(Filed June 10, 1981)

DECISION and ORDER

Appeal from the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan and Sidney Ravkind (Mandell & Wright), Houston, Texas, for the claimant.

E. D. Vickery and Thomas C. Fitzhugh, III (Royston, Rayzor, Vickery & Williams), Houston, Texas, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by Newpark Shipbuilding and Repair, Incorporated and American Home Assurance Company (hereinafter, employer) from the Decision and Order (79-LHCA-973N) of Administrative Law Judge David W. DiNardi pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter, the Act). Claimant has filed a cross-appeal. The principal issue raised in these appeals is whether the administrative law judge correctly calculated claimant's average weekly wage.

The administrative law judge found that neither Section 10(a), 33 U.S.C. § 910(a), nor Section 10(b), 33 U.S.C. § 910(b), could be fairly or reasonably applied in calculating claimant's average weekly wage. Therefore, he held that claimant's average weekly wage should be calculated under Section 10(c), 33 U.S.C. § 910(c). The administrative law judge found that claimant's gross earnings while self-employed in the year prior to injury constituted his average annual earnings under Section 10(c). Applying Section 10(d), 33 U.S.C. § 910(d), the administrative law judge divided this figure by 52, and held that claimant's average weekly wage equalled $360.41. He awarded claimant temporary total and temporary partial disability benefits based on this figure. He also awarded claimant's attorney an attorney's fee since the award of compensation was greater than amounts voluntarily paid by employer at an average weekly wage of $254.59.[1]

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1. Employer originally paid benefits based on an average weekly wage of $224. On October 31, 1978, the compensation rate was retroactively adjusted to $254.59.

Employer appeals, asserting that it complied with all the requirements for application of Section 10(b) of the Act and that, therefore, Section 10(b) must be applied in calculating claimant's average weekly wage. Employer also contends that, if claimant's average weekly wage is calculated pursuant to Section 10(b), then claimant is not entitled to any temporary partial disability benefits because his post-injury wage-earning capacity would be higher than his pre-injury average weekly wage. Employer also asserts that an attorney's fee is not properly awardable if claimant's average weekly wage is calculated pursuant to Section 10(b).

Claimant filed a cross-appeal, arguing that the administartive law judge erred in calculating claimant's average weekly wage. Claimant argues that, on the facts of this case, the methodology of Section 10(a) should have been used in the application of Section 10(c). In the alternative, claimant argues that it is appropriate to use 43 weeks as the divisor indicated in Section 10(d), rather than the 52 weeks used by the administrative law judge.[2] Oral argument was held in this case in Houston, Texas, on August 9, 1980. Claimant appeared to change his position at oral argument. There, he argued that Section 10(c) was properly applicable, that use of a 52-week divisor was proper, and that the administrative law judge's calculation of claimant's average weekly wage should not be overturned.[3] We nevertheless address all of claimant's contentions on appeal.

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2. Claimant also argues on appeal that the administrative law judge's order awarding claimant temporary total disability benefits should be modified to provide that these benefits continue "until further order."

3. Claimant contended that Section 10(c) was applicable at the hearing below.

Upon its review of the case, the Board is required to affirm the decision of the administrative law judge if it is supported by substantial evidence in the record considered as a whole, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a welder-fitter in employer's shipyard on April 22, 1975. On his first day of work, claimant was injured when he tripped and fell while working on a scaffold in the hold of a barge. As a result, claimant injured his neck and lacerated his head, requiring 30 stitches.

Prior to his employment with employer, claimant was self-employed as a welder. Claimant began his independent welding business in 1954 and continued it until March 1975 when he sold his equipment. Claimant primarily worked as an independent contractor repairing boats and barges and performing pipe work in an oilfield for Amoco Production Company. Claimant's hourly rate was $10.50 from April 23, 1974, through November 1974. In December 1974, his hourly rate increased to $12.50. When employed by employer, claimant was paid $5.50 per hour with a $.10 shift differential. Claimant testified that he accepted the lower pay in return for steady employment with available overtime.

Following his April 22, 1975, injury, claimant returned to work for employer at the end of August 1975. He received a $.25 per hour raise in December 1975, and was earning $6.40 per hour when he left employer in August 1976. From August 1976 to March 1978, claimant worked for a variety of other employers with pay rates ranging from $8.50 to $10.50 per hour. Claim-

ant has not returned to work since March 29, 1978. Although employer was paying compensation benefits for temporary total disability voluntarily, claimant filed a claim under the Act for temporary total and temporary partial benefits because a dispute arose as to his average weekly wage.

Both claimant and employer in the instant case raise a variety of arguments involving the determination of claimant's average weekly wage pursuant to Section 10.[4]

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4. Section 10 provides, in pertinent part:

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings if a six-day worker, shall consist of three hundred times the average daily wage or daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the

Section 10 sets forth three alternative methods for determining a claimant's average weekly wage. The intent is to determine claimant's earning power at the time of the injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543, BRB Nos. 77-877/A (1978); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, BRB Nos. 75-177/A (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).[5] All three methods are keyed to a determination of claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage. Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. Section 10(a) is used when the employee worked "substantially the whole of the year" preceding the injury and Section 10(b) is used when he did not work substantially the whole of the year. Section 10(c) is a "catch-all" to be used in instances when neither of the above two methods are reasonably and fairly applicable.

We turn first to employer's argument that claimant's average weekly wage must be determined pursuant to Section 10(b).[6] Employer introduced the wages of three

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services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifth-second part of his average annual earnings.

5. Although claimant's work injury occurred in April 1975, the full effects of this injury did not become apparent for some time. Claimant finally left work in March 1978. The parties focus on claimant's average weekly wage at the time of the April 1975 injury.

6. Since claimant withdrew his arguments concerning applicability of Section 10(a) at oral argument, we need not consider that section. We note, however, that Section 10(a) is not properly applicable in this case. The administrative law judge held that Section 10(a) was

employees who worked for employer in the same classification and who performed the same work as claimant during his employment with employer. This evidence of the wages of substitute employees complied with the requirements for invoking Section 10(b). *See Eckstein v. General Dynamics Corp.*, 11 BRBS 781, BRB No. 78-428 (1980); *Lozupone v. Stephano Lozupone & Sons,*

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not applicable in this case because claimant did not work substantially the whole of the year prior to injury in *covered* employment. His rationale indicates that, in determining whether Section 10(a) was applicable, the administrative law judge focused on whether claimant was engaged in employment within the jurisdiction of the Act for substantially the whole of the year prior to his injury. We do not agree that claimant must be engaged in employment within the coverage of the Act insofar as that implies that the employment must be maritime or that the employee must work for a covered employer during the year prior to injury. The clear language of the statute provides a formula for computing average weekly wage where a claimant works substantially the whole of the year for *the same or another employer.* Wages earned by a claimant in employment outside the coverage of the Act may therefore fall within Section 10(a) if they are earned in the same employment as at the time of injury regardless of whether it is covered by the Act.

Nonetheless, Section 10(a) is not applicable where claimant was self-employed in the year prior to injury. Employment as an independent contractor necessarily involves different duties from those of a regular employee. Section 10(a) is meant to apply to a regular five- or six-day worker and is intended to compensate full-time employees who work a regular working week at regular hours. The number of hours claimant worked each day and the number of days worked each week varied with each particular job.

Moreover, Section 10(a) does not provide a formula which approximates the earning capacity of a self-employed claimant. Indeed, use of 10(a) would inflate claimant's earning capacity in an arbitrary manner without regard to the true value of his services. The rate for hiring a person who is operating an independent business does not necessarily reflect the value of his services. Even though claimant's time was billed at an hourly rate while he was working as an independent contractor, this hourly rate is not indicative of the value of his services as is the rate paid by an employer to a regular hourly employee in circumstances contemplated by Section 10(a). Section 10(a) cannot be fairly and reasonably applied in this case.

12 BRBS 148, BRB Nos. 79-158/A (1979); *Daugherty v. Los Angeles Container Terminals, Inc.*, 8 BRBS 363, BRB No. 77-616 (1978). The administrative law judge rejected application of Section 10(b) because (1) the statistical sample of three out of 100 welder-fitters at employer's business was not adequate; and (2) the employees of employer whose wage records were entered into evidence received a wage increase two months before claimant's injury. *See* Decision and Order, slip op. at 18-19. As employer correctly points out, the administrative law judge's first reason for rejecting the computation of average weekly wage under Section 10(b) cannot be upheld. Section 10(b) requires only that the wages of one substitute employee be entered into the record; a statistical sampling of employees is not required. *See* 33 U.S.C. 910(b); *Orkney v. General Dynamics Corp.*, 8 RBS 543, BRB Nos. 77-877/A (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303, BRB No. 77-834 (1978).

It is employer's position that, since it introduced the evidence required by Section 10(b), that section *must* be applied. However, the clear language of Section 10(c) provides that it is applicable where Sections 10(a) and 10(b) cannot fairly and reasonably be used. Where those sections do not yield an average weekly wage reasonably reflective of claimant's earning capacity at the time of injury, they need not be applied. *See Sobolewski v. General Dynamics Corp.*, 5 BRBS 474, BRB No. 76-306 (1977), *aff'd on other grounds sub nom. General Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). Section 10(b) provides neither the framework nor the flexibility for adequate consideration of claimant's earnings while self-employed.

The formula contained in Section 10(b) would not reasonably or accurately approximate claimant's earning capacity in the year prior to injury when working as an independent contractor. Use of Section 10(b) results in an artificial wage rate totally unrepresentative of claimant's value as a self-employed worker. Claimant's earnings as an independent contractor include variables which cannot be given full consideration within the framework of Section 10(b). Therefore, Section 10(b) cannot be fairly and reasonably applied.

Application of Section 10(b) here must be rejected for an additional reason. The administrative law judge concluded that Section 10(b) could not be reasonably or fairly applied, in part, because of a recent wage increase received by the three fellow workers whose wage records were entered into evidence. The record reveals that there was a yard-wide increase in wages some two months before claimant began working. It is readily apparent that calculation of average weekly wage under Section 10(b) would spread the wage increase received two months before claimant's injury over a 12-month period, thereby diluting the amount of the increase. Therefore, the administrative law judge's decision that Section 10(b) cannot be fairly and reasonably applied is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe, supra. See generally Eckstein, supra; Lozupone, supra; Toraiff v. Triple A Machine Shop,* 1 BRBS 465, BRB No. 74-205 (1975).

We turn then to the proper calculation of claimant's average weekly wage under Section 10(c). Section 10(c), 33 U.S.C. § 910(c), explicitly provides for consideration

of "the reasonable value of the services of the employee if engaged in self-employment."[7] Claimant urges on appeal that either the methodology of Section 10(a) or a 43 week divisor be applied to claimant's gross earnings in self-employment. While we agree that claimant's earnings in self-employment may be the basis for determination of his average weekly wage, we cannot agree that either method urged by claimant on appeal reasonably approximates the value of claimant's services. Use of the methodology of Section 10(a) under Section 10(c) is neither supported by law nor would it reasonably reflect claimant's earning capacity any more than would direct application of Section 10(a). Insofar as claimant's contention that his gross earnings be divided by the number of weeks actually worked, 43, is concerned, there is no support for use of a lesser divisor than 52 weeks. If claimant's gross earnings in self-employment are accepted as claimant's average annual earnings, then use of the 52 week divisor is required by Section 10(d). *See Eckstein; Strand v. Hansen Seaway Service Ltd.,* 9 BRBS 847, BRB Nos. 77-508/A (1979), *aff'd in part and rev'd in part,* 614 F.2d 572, 11 BRBS 732 (7th Cir. 1979). The Board's holding in *Brown v. General Dynamics Corp.,* 7 BRBS 561, BRB Nos. 77-146/A (1978), is not applicable in this situation. In *Brown,* the Board upheld the administrative law judge's division of average annual earnings by 39 weeks because claimant's wage records beyond 39 weeks were unavailable despite employer's assurances that they would be produced. However, in *Brown,* the employee had actually worked for

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7. Section 10(c) is thus the only portion of Section 10 explicitly including claimant's earnings while self-employed. This fact supports use of Section 10(c) where self-employment earnings are involved.

52 weeks; thus, use of a 52 week divisor into earnings over a 39 week period would have distorted the determination of claimant's earning capacity. In the instant case, claimant only worked 43 weeks. Therefore, *Brown* is distinguishable and does not support use of a 43 week divisor here.

We also cannot accept the formula urged by employer. Employer urges us to use claimant's gross earnings less his income tax deductions. We are not persuaded that this method would result in a wage figure equal to the reasonable value of claimant's services in approximation of his wage-earning capacity under Section 10(c). The phrase "reasonable value of the services of the employee", 33 U.S.C. § 910(c), indicates that claimant's average weekly wage should reflect the value of the work to be performed. There is no indication that the value of claimant's work equalled his wages less his income tax deductions. Income tax deductions are not necessarily indicative of actual business expenditures or the costs of doing business as an independent contractor. For example, in this case, claimant's deductions include such items as depreciation allowances for equipment which, in reality, did not decrease his actual income. This formula may be easy to apply; however, there is no basis for assuming that the reasonable value of claimant's services is equal to his net earnings. Therefore, this method is rejected.

However, the method used by the administrative law judge also fails to adequately approximate the reasonable value of claimant's services in the year prior to injury. The administrative law judge merely used claimant's gross earnings in self-employment as claimant's average annual earnings under Section 10(c). The administrative law

judge considered claimant's income tax deductions, concluded they were minimal and, therefore, determined that they should not be subtracted from claimant's gross earnings. Furthermore, the administrative law judge considered claimant's hourly rate increase from $10.50 per hour to $12.50 per hour and found that this increase offset the income tax deductions. He therefore determined that claimant's gross earnings equalled "the reasonable value of his services." The administrative law judge erred in solely relying on claimant's gross earnings in self-employment to approximate the reasonable value of claimant's services. The phrase "reasonable value of the services of the employee" in Section 10(c) indicates that claimant's average annual earnings must reflect the value of the work he performed. The reasonable value of claimant's services may be determined by showing the cost of hiring another welder of equivalent skill and experience to perform the work performed by claimant. This is not the sole method for showing the reasonable value of claimant's services; any other rational manner may be used. However, claimant's earning capacity under Section 10(c) should not include any portion of claimant's earnings which constitute profits, or represent intangible elements such as goodwill. Thus, any amounts included in claimant's gross hourly wage as an independent contractor over and above the reasonable value of his services should be excluded.

Because the administrative law judge failed to fully consider the foregoing, this case must be remanded for additional findings of fact and conclusions of law. On remand, the administrative law judge must determine the reasonable value of claimant's services when self-employed by considering the cost of hiring another welder

of skill and experience comparable to claimant or by using any other rational means.[8] The administrative law judge may open the record to take additional evidence as is necessary.

Claimant also contends that the administrative law judge's order awarding temporary total disability benefits should be modified. The administrative law judge ordered temporary total disability benefits "throughout the continuance of such disability or until such time as a new compensation order is obtained pursuant to the provisions of Section 22 of the Act." Decision and Order, slip op. at 24. Claimant asks that the Board delete these words and substitute the words "until further order," contending that the wording used by the administrative law judge is unclear and ambiguous and could be construed by employer to permit it to unilaterally terminate benefits when a claimant reaches maximum medical improvement. However, in *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33, BRB No. 78-532 (1979), the Board held that, once an order awarding compensation has been entered, employer remains obligated to comply with the terms of the award until a further order is issued. In the instant case, employer must continue paying temporary total disability benefits until a further order is issued. Should employer unilaterally terminate compensation, claimant can seek appropriate relief.

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8. The administrative law judge apparently felt limited to claimant's actual earnings in the year prior to injury. He is not restricted to actual earnings. However, the party asserting that actual wages should not be used has the burden of proof in showing wage-earning capacity. *See Riddle v. Smith & Kelly Co.*, BRBS , BRB No. 80-410 (April 24, 1981).

Employer contends that the administrative law judge's award of temporary partial disability benefits and an attorney's fee should be vacated if claimant receives a lower average weekly wage. Since we have concluded that the case must be remanded to the administrative law judge for a redetermination of claimant's average weekly wage, consideration of these issues at this time is not appropriate.

Claimant's attorney seeks a fee for work performed before this Board. Since this case must be remanded to the administrative law judge, a fee for this work is not appropriate at this time.

Accordingly, the Decision and Order of the administrative law judge regarding claimants average weekly wage is vacated and remanded for further proceedings consistent with this opinion.

SO ORDERED.

/s/ ISMENE M. KALARIS
Ismene M. Kalaris
Administrative Appeals Judge

I Concur:

/s/ JULIUS MILLER
Julius Miller
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decision to vacate the Decision and Order below in part and remand for further proceedings regarding the issue of average weekly wage. However, as I would direct the administrative law judge to apply Section 10(b) on remand, I must dissent in part from the majority opinion.

The average weekly wage computation methods set forth in Section 10 are directed towards determining the claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543, 545-546 (1978); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, 249 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752 (7th Cir. 1979). Section 10(a) applies where an injured employee has "worked in the employment in which he was working at the time of injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. . . ." Section 10(b) applies if the injured employee "shall not have worked [in the employment in which he was working at the time of injury] during substantially the whole of [the year immediately preceding his injury. . . ." Section 10(c) applies "[i]f either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . ." [Emphasis added.] 33 U.S.C. §§ 910(a), (b), (c).

Accordingly, by express statutory mandate and under the relevant case law, Section 10(c) may not be invoked until it has been established that neither Section 10(a) nor Section 10(b) reasonably and fairly may be applied.

33 U.S.C. § 910(c); see also *Palacios v. Campbell Industries,* No. 78-3358 (9th Cir. Dec. 4, 1980).

For the reasons expressed in the majority opinion, I conclude that Section 10(a) cannot be applied in the instant case. However, Section 10(b) indicates that the average weekly wage may be based upon the wages of an employee of the same class as claimant who worked substantially the whole of the year preceding claimant's injury in the same or similar employment. Thus, to apply Section 10(b), the administrative law judge must have evidence of the substitute employee's wages. *Eckstein v. General Dynamics Corp.,* 11 BRBS 781 (1980); *Lozupone v. Stephano Lozupone & Sons,* 12 BRBS 148 (1979).

Employer herein introduced evidence of the wages of three employees who worked for employer in the same classification as claimant and who performed the same work as did claimant during his stint with employer. This evidence of the wages of substitute employees complies with the requirements for invoking Section 10(b). As noted by the majority, the administrative law judge erroneously rejected the option of calculating average weekly wage pursuant to Section 10(b) on the ground that a statistical sampling of employees' wages was required.

Accordingly, the application of Section 10(b) was herein mandated by the Act unless that method of computation would not fairly and reasonably reflect claimant's earning power at the time of injury.

In my view, the formula contained in Section 10(b) was the most fair and reasonable means of determining

the market value of claimant's services, and thus his earning power at the time of injury. In fact, the majority concedes this point, in concluding that the reasonable value of claimant's services may be determined with reference to the cost of having another welder of equivalent skill and experience perform the work undertaken by claimant.

Finally, I decline to accept the conclusion reached by the administrative law judge and the majority herein that Section 10(b) could not reasonably and fairly be applied because of the yard-wide increase in wages granted to employees some two months before claimant began working.

Average weekly wage is determined as of the time of injury. 33 U.S.C. § 910; *see also Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231, 235-236 (1981). Accordingly, under the express provisions of the Act, claimant's average weekly wage must be calculated with reference to the wage rate of similar employees at the time of claimant's injury. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Drake v. General Dynamics Corp.*, 11 BRBS 288, 293 (1979). Although the mode of calculation of average weekly wage set forth in Section 10(b) to some extent dilutes the effect of a wage increase granted shortly before a claimant's injury, the calculation does recognize and include the raise. In any event, whatever inequity results from the "dilution" of the wage increase is statutorily mandated, and the Board may not, by judicial construction, overrule the express provisions of the Act.

Accordingly, for the above-stated reasons, I would vacate the Decision and Order below in part, and remand for application of Section 10(b).

/s/ SAMUEL J. SMITH
Samuel J. Smith, Chief
Administrative Appeals Judge

Dated this 10th day
of June 1981

SERVICE SHEET

BRB Nos. 80-158 & 80-158A

James P. Rountree
v.
Newpark Shipbuilding & Repair, Inc. and
American Home Assurance Co.

(Case No. 79-LHCA-973N) (OWCP No. 8-26253)

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APPENDIX D

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Reply to the Attention of: OALJ

Case No. 79-LHCA-973N
OWCP No. 8-26253

In the Matter of

JAMES P. ROUNTREE, Claimant

against

NEWPARK SHIPBUILDING AND REPAIR, INC.[1]
Employer

AMERICAN HOME ASSURANCE CO.
Carrier

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For the Employer/Carrier

Before: DAVID W. DI NARDI
Administrative Law Judge

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1. Employer's name was changed in February 1978 from Bludworth Shipyards, Inc. to Newpark Shipbuilding & Repair, Inc. (Tr. 119-120).

DECISION AND ORDER

Statement of the Case

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), hereinafter referred to as "the Act". The hearing was held on June 4, 1979 in Houston, Texas, at which time all parties were given the opportunity to present evidence, oral arguments and post-hearing briefs which have been identified and introduced into the record as Claimant's Exhibit 15 and Respondents' Exhibits 7 and 8. Application for an attorney's fee, submitted by Claimant's attorney, has been admitted into evidence as Claimant's Exhibit 16. Objection thereto has been admitted into evidence as Respondents' Exhibit 8.

Upon request made by both counsel, the record herein was left open, beyond the additional briefing timetable established, to permit submission of additional post-hearing evidence. Thereafter, the depositions of Walter A. Hammann, III and of the Claimant were submitted for introduction into the record. These have been identified and admitted into evidence as Claimant's Exhibits 20 and 21, respectively. The record herein was closed on September 27, 1979. This decision is being rendered giving full consideration to the entire record.

Motion To Limit Any Compensation Order To The Time Period Prior to Hearing

At the hearing Respondents' counsel maintained (1) that the only issue to be tried at the hearing was Claimant's average weekly wage at the time of his injury, (2)

that the Deputy Commissioner had not yet considered the issues of temporary total or temporary partial disability, (3) that once the average weekly wage had been determined, then the claim should be remanded to the Deputy Commissioner for consideration as to whether there existed any temporary partial disability, that any compensation order issued herein should be limited only to the issue of average weekly wage and to a time period ending at the date of hearing and (4) that the claim would be referred to the Office of Administrative Law Judges should the parties fail to agree with any recommendation subsequently made by the Deputy Commissioner. (Tr. 58-71, 81, 83, 88-91). On the other hand, Claimant's counsel opposed this motion, maintaining (1) that the claim should not be tried on a piecemeal basis (Tr. 56), (2) that the claim has been referred to the Office of Administrative Law Judges for hearing on all the issues and (3) that it would not be proper to limit the hearing to the issue of average weekly wage (Tr. 55, 58, 61, 64-66, 76-79). The parties were advised that the claim had been referred to the Office of Administrative Law Judges for formal adjudication of all of those issues which had been considered by the Deputy Commissioner, as well as of any new issue the resolution of which would not completely settle the claim by remand to the Deputy Commissioner (Tr. 73-75, 20 C.F.R. § 702.336). However, the undersigned Administrative Law Judge reserved ruling on the motion until the closing of the record herein to permit the parties to establish the procedure whereby by stipulation or otherwise the parties would return to the Deputy Commissioner for implementation of a compensation order limited to average weekly wage (Tr. 81). No such stipulation or agreement was filed herein.

In view of the foregoing and an analysis of pertinent regulations, I hereby overrule Respondents' motion and hold that I should not issue a compensation order limited only to the issue of average weekly wage and to the time period prior to the hearing. The bifurcated hearing sought by the Respondents is not the procedure envisioned by the regulations. 20 C.F.R. § 702.336. Furthermore, the existence of a new issue on the eve of trial, the resolution of which by the Deputy Commissioner might settle the claim, requires that the hearing not be held and the entire file be remanded to the Deputy Commissioner (Tr. 82; 20 C.F.R. §§ 702.336 and 702.316).

Objections To Evidence As To Post-Injury Earnings

Respondents objected to any evidence by Claimant as to any and all earnings outside of the fifty-two week period preceding his injury (Tr. 28-29, 40-41). This objection was overruled as it was clearly relevant, material and probative to the issue of average weekly wage and to this claim for workmen's compensation benefits. Post-injury wage information is clearly admissible. *Tri-State Terminals, Inc., et al. v. Fred Jesse, et al.,* 596 F.2d 752, 10 BRBS 700, 705 (7th Cir. 1979). Furthermore, the Board, in appropriate circumstances, has reversed and remanded an average weekly wage calculated ONLY on the basis of Claimant's earnings for the fifty-two weeks immediately preceding his injury. *Willard D. Hatchett v. Duncanson-Harrelson Co. and Employers Insurance Co. of Wausau,* 8 BRBS 173, BRB No. 77-487 (April 24, 1978). *See also* 20 C.F.R. § 702.339.

Stipulations

The parties have stipulated, and I find, as follows:

1. The Act applies;

2. On April 22, 1975 the Employer/Employee relationship existed between Bludworth Shipyards and James P. Rountree;

3. On April 22, 1975 the Claimant suffered an injury to his back, which injury arose out of and in the course of his employment with the Employer;

4. The Employer was notified of the injury on the same date;

5. The Employer filed a notice of controversion herein on December 15, 1978;

6. The Employer has, voluntarily and without an award, paid compensation benefits for the time period April 22, 1975 to August 26, 1975 and from March 28, 1978 to the present and continuing at the weekly rate of $149.33, based upon an average weekly wage of $224.00. On October 31, 1978 the compensation rate was changed retroactively, according to Respondents' counsel, to $169.73, based upon an average weekly wage of $254.59, these adjustments being made to include differentials on past due amounts. Claimant has been paid a total of $3,602.65 at the time of the hearing; and

7. Medical benefits are not an issue herein.

The principal unresolved issues in controversy are:

1. Claimant's average weekly wage at the time of the injury;

2. Nature and extent of any disability; and

3. Attorney's fees, costs, penalties and interest.

Claimant was fifty-seven years of age at the time of the hearing, married, had a tenth grade education, and had obtained his G.E.D. certificate in 1967. Claimant has worked as a roustabout in the oil fields and went to work in the shipyards in 1941 after completing eight weeks of welding school. He commenced working for Consolidated Steel at that time. He also spent nine years as a roughneck or part-time welder. On March 2, 1954 Claimant purchased his own equipment and became an independent contractor doing welding work and repairing boats and barges for Amoco. This five-day work week involved cutting out and redoing the bottoms and sides of vessels, at times working with a crew supplied by Amoco. Claimant testified that this work was his only enjoyment and that it was continuous. From April 23, 1974 to the end of November 1974 Claimant charged Amoco $10.50 per hour, which rate was increased to $12.50 on December 1, 1974. Claimant gave up his status as an independent contractor/welder because he had to sell his business and equipment to settle a legal separation and divorce (Tr. 25-36).

On April 22, 1975 Claimant went to work for the Employer as a welder/fitter at the hourly rate of $5.50 plus a ten cent per hour shift differential. At this time a first class welder was earning $5.95 plus a ten cent shift differential. On this first day of employment Claimant was in the process of welding a hole in a barge which had been fitted and tacked. He was standing on a scaffold and as he reached to weld he slipped and fell onto the deck of the barge, his forehead sustaining a laceration requiring thirty sutures to close. Claimant testified that the welding he was doing at the time of his injury was similar to the welding he was doing the year previous to

his injury. Claimant returned to work the last week of August 1, 1975 and received a twenty-five cent per hour raise in December of 1975. Claimant's 1974 tax return includes billings at the same hourly rate except for the December 1974 billings, Claimant testifying that he missed five weeks as a result of surgery in September and that the extra income in the early months of 1975 resulted from the December 1974 hourly increase and a fire at Amoco requiring long hours of overtime to put a compressor back into production. Claimant was earning $6.40 an hour when he left the employer on August 3, 1976 (Tr. 36-41, 47, 51, 84).

Claimant went to work as a welder at Sepco, at an hourly rate of $10.50, from September 6, 1977 to November 22, 1977, testifying there were weeks he was not working and did not receive compensation and that he left this work because the work was heavy and he was afraid of heights. Claimant then went to work for Badger America, from August 3, 1976 to December 14, 1976, as a welder but failed to pass the "pipe test" because of his nerves and was thereupon laid off upon completion of the job. Claimant could not obtain work at Amoco Chemicals (could not pass the physical), Union Carbide and Diamond Shamrock. During this time Claimant received unemployment compensation. He then went to work at Ro-Has from March 19, 1977 to June 4, 1977, work he described mostly as ground-level work installing aluminum products such as carports and windows at a weekly salary of $300.00 for forty-four hours. Since this work also involved the use of ladders and Claimant was afraid of heights as a result of his fall, Ro-Has laid off the Claimant. From November 30, 1977 to March 29, 1978 Claimant worked at L. S. Mitchell & Sons, Tex-

arkana, Texas, work involving welding and fitting items on ground levels at a salary of $8.50 per hour. Claimant left this work because of his neck problems and the need to have an operation and has not worked since this time. Claimant testified that he did not earn as much money at these various jobs as he would have if he had been in good physical condition (Tr. 81-90).

Upon cross-examination, Claimant admitted that on his pre-employment application with the Employer he listed his previous work as a self-employed welder for twenty years, that as an independent contractor for Amoco he had a considerable amount of expenses involved in operating his own business such as purchasing oxygen, welding rods, hand tools, aceteylene, a welding rig mounted to his truck, insurance coverage, as well as various utility expenses; he sometimes used his car and a room in his home for his business and wrote these expenses off on his tax return, as well as taking depreciation on his occupational property; he also had to collect and pay sales taxes, *ad valorem* taxes on his personal business property and an occupational license tax as a self-employed individual. Claimant's wife kept his business records and made out the invoices, Claimant remarking that he did not know the location of copies of these invoices or of the Amoco contracts, a contract which lasted for one calendar year, specified the hourly rate to be charged and requiring a thirty day advance notice of any rate increase. Claimant stated that he voluntarily left the Employer because he "just couldn't do the work anymore' and that he took a substantial pay cut to work at the Employer because he could depend on a five-day work week and not worry about rainouts. He admitted that the Employer furnished most of his welding rods,

gas oxygen and other such items. Claimant did not know if the Employer had a category of welder/fitter below the category at which he was hired on April 22, 1975 (Tr. 92-11).

Claimant furnished additional testimony by deposition on September 13, 1979 (Claimant's Exhibit 21). He stated that there was no difference between the boat and barge repair work he did for Amoco as an independent contractor and the boat and barge repair work at the Employer. There was no difference between the pipe work or fabrication work at the two locations. About two-thirds of Amoco's work is on the water. Claimant's work on land at Amoco involved barge and boat repair work at the dock and warehouse, similar to work at the Employer. Offshore work involved working on the barge, welding and laying pipe off the barge. With reference to the work items identified by Mr. Hammann as performed by Employer's welders/fitters, Claimant performed most of these duties in the year before his injury while working as an independent contractor and did not specifically itemize the work performed because Amoco did not request such itemization. Furthermore, the skills of cutting, fitting and welding needed at Amoco Production were the same skills needed to work for the Employer. Claimant admitted that a welder/fitter at the Employer must purchase certain tools and equipment such as welding hoods, burning goggles, welding sleeves, welding gloves, measuring tape, center punch, combination square, screwdriver, ten-inch crescent wrench, ball-pin hammer, pliers, welding lens and a flashlight. As an independent contractor, Claimant had to furnish his own welding gas, oxygen and acetylene, truck and welding machine, certain small hand tools,

welding rods, stingers, torches, cutting tips and acetomatic burning equipment (*Ibid.*, 4-24).

Upon cross-examination, Claimant stated that in the year pre-injury he spent about twenty days working on or repairing a boat or a barge, that he was working a five-day week, that the work items enumerated by Mr. Hammann related to ship and barge repair and construction, that his new ship construction invoices had to contain a brief description of the work performed, that he used no automatic equipment in the year pre-injury, that he did not need a truck at the Employer's shipyard because the work was at one location, that the work of a welder/fitter, regardless of where the work is, "is theoretically the same" because "(t)he skills for the two jobs are the same." He further testified that at Amoco Production, the major part of his work was pipe work and that at the Employer's the majority of his work, during over a period of one year, was ship repair with some fabrication work in the shop and some pipe work (*Ibid.*, 25-45).

Upon redirect examination, Claimant stated that he has been a welder and fitter since 1941, except for nine years of work in the oil field, that he considered himself a first class welder/fitter and that the job skills of fitting, cutting and burning are more important than the location where those skills are used (*Ibid.*, 46-47).

Mr. Walter A. Hammann, III, Industrial Relations Manager, Newpark Shipbuilding and Repair, Inc., (formerly Bludworth Shipyards, Inc. until February 1978), testified that he is custodian of the business records, that Claimant and other welder/fitters worked a five-day week, that he selected the wage records of three other welder/fitters who were employed by the Employer on April

22, 1975, that there was a thirty to forty cents per hour differential between the three classifications of employees —a helper (unskilled laborer), an apprentice (semi-skilled helper) and a welder/fitter, someone who really is a first class welder (Tr. 119-129).

Upon cross-examination, Mr. Hammann testified that he did not know how many years of experience those three workers had, that he picked nine or ten welder/fitters at random from all of those welder/fitters who were working there at the time of the accident and who were making the same hourly wage and that Employer has about one hundred welder/fitters among the two hundred employees. Mr. Hammann did not know if any of the welder/fitters who were not selected had twenty years experience, remarking that Johnny Colunga has at least fifteen years welding experience with the Employer but that he was not included among the similar employees because he did not meet the criteria he was given to select the welder/fitters for this controversy. Eight hours is the regular work day, with overtime at that time payable after forty hours but now payable after eight hours. Some welders work a lot of overtime but this factor did not enter into his selection of the employees. Mr. Hammann remarked that overtime is distributed equally among all employees and that overtime is available on a particular job if a customer is willing to pay for it. Employer's hiring policy on welders with previous experience is to give them an easy welding test to enable them to qualify for the welder/fitter classification but a welder must have had previous experience as a foreman to be hired as one. Employer has no union contract and there was a yard-wide salary increase in 1974, as well as merit increases and a fifty cent per hour increase be-

tween January 31, 1975 and February 14, 1975. Mr. Hammann admitted that Mr. Comeaux may have been earning $6.50 an hour and was one of the higher paid welders in the yard. He further admitted that he did not check the accident and injury records to see if either of the three workers had lost any work time due to an accident or sickness. Mr. Hammann also admitted that Paul Rico, one of the three selected workers, was earning $5.10 per hour for a forty hour week in April of 1974 and was earning $5.60 per hour for the week ending February 14, 1975, reflecting a yard-wide increase at that time. Mr. Hammann also admitted that another worker, Haywood Comeaux, was earning $6.25 per hour for the week ending March 14, 1975 and $6.35 per hour for the week ending April 25, 1975 and "that during that time Mr. Comeaux was probably one of the higher paid persons in the yard." Mr. Hammann admitted that the third worker selected, J. C. Medellin, also received a fifty cents per hour increase for the week ending February 14, 1975 (Tr. 129-148).

Mr. Walter A. Hammann, III, furnished additional testimony by deposition (Claimant's Exhibit 20) on September 13, 1979. Mr. Hammann stated that he has responsibility for hiring Employer's welders and fitters, that they are hired on the basis of a three position welding test and a background test, that Claimant, on the basis of his previous work experience, was not a well qualified welder/fitter at Employer's shipyard because there were few jobs related to ship building and repair, that although there was some pipe work done at the Employer's shipyard the main work involves structural fitting and welding and that there were both new construction and repair crews working there. He further testified that the duties

of a welder/fitter involve cutting, welding and fitting, that Claimant's work as an independent contractor involved the peripheral edge of ship construction and ship repair such as outfitting of a ship as opposed to a major aspect of ship construction and repair such as (1) putting up a cofferdam, (2) hanging side shells or wing tanks on a crawler crane, (3) replacing the knuckle or bilge plate on a barge, (4) setting the head log cradle and blocks on the marine railway for haul-out, (5) working on, in or around a marine railway, (6) working on, in or around a floating dry dock, (7) building a bow or stern section of a barge upside down, (8) pulling replacement and alignment of wheel shafts or rudders, (9) replacing decks, hulls or side shells, (10) shortening barges by removing sections of the mid-body, (11) working in conjunction with lofting personnel and (12) hanging, replacing or beefing up frames or stiffeners (*Ibid.*, 4-15).

Mr. Hammann stated that these enumerated tasks comprise ninety per cent of the duties of a welder/fitter employed at the Employer's shipyard and on occasions a welder/fitter might be chopping weeds, instructing other welder/fitters, preparing a barge for launch, aligning the launchways and other such tasks because Employer's welder/fitters are not strictly classified as to work duties. Mr. Hammann stated that the Employer furnished most tools and equipment such as welding machines, come-alongs, hydraulic jacks, overhead, gantry and crawler cranes, cherry pickers, winch truck, chain falls, floating dry dock, marine railways, automatic burning table, sledge hammers, welding rods, air and gas (*Ibid.*, 16-20).

Upon cross-examination, Mr. Hammann stated that he has worked in an oil field in the past, most recently as

a recruiter of personnel to staff the rigs, that he is familiar with oil field work in Louisiana, and with the kind of work performed by a welder in the operation of an offshore rig or fixed platform (*Ibid,* 20-22, 25).

Mr. James H. Johnson, Employer's current repair superintendent and yard foreman at the time of the accident, testified that Claimant and Messrs. Rico, Comeaux and Medellin, the three selected similar employees, were in the same work classification of welders/fitters and were five day workers, that a person is not compelled to work overtime which was always available, mainly on weekends, that all overtime is distributed fairly evenly among all employees, and that all hiring and promotions are made by front office personnel (Tr. 151-156).

Dr. Thomas O. Moore, an orthopedic surgeon, examined Claimant on May 2, 1979 and reported that Claimant's work-related injury on April 22, 1975 resulted in an operation on May 30, 1975 for removal of a herniated intervertebral disc at the C6-7 level. Claimant noted some gradually increasing stiffness and pain in his neck and some left leg and arm pain and worked intermittently from December 1976 until April 13, 1978, at which time Dr. Bruce Cameron performed a posterior cervical spine fusion from C6 to C7. Claimant's pain continued and, on June 16, 1978, Drs. Henry and Cameron operated on Claimant and inserted a "prothesis" in his neck. However, the pain became progressively worse and, on March 26, 1979, Dr. Fulford re-operated from the front and performed an interbody fusion at the C5-6 cervical level. Dr. Moore expressed the opinion that six weeks post-operation is entirely too early to render a reasonable prognosis, that Claimant will continue to improve and

that a final evaluation should wait another four months (Respondents' Exhibit 2).

This case presents the following conflicting claims as to the method by which the average weekly wage is to be determined.

Claimant maintains that the "methodology of Section 10(a) results in an average weekly wage of $498.45. The average daily wage is $99.60 ($18,741.00 ÷ 188). The average weekly wage is then $498.45 [(99.60 × 260) ÷ 52)], since Mr. Rountree worked five-days a week . . . and because Mr. Rountree's employment appears from Claimant Exhibit 9 to be more or less continuous, it would seem the methodology of Section 10(a) should be applied, whether the award itself is pursuant to Section 10(a) or (c)." Furthermore, Claimant maintains that "Section 10(b) clearly does not apply, because to apply that section is to deprive the employee of the benefit of the best evidence of his earning capacity (actual earnings) and to diminish his compensation by approximately fifty per cent. Moreover, Claimant can find no case where Section 10(b) was applied to the Claimant's detriment where he has in fact worked the entire year before injury. Section 10(c) applies 'when Section 10(a) and (b) cannot reasonably and fairly be applied'." Claimant requests entry of an order for temporary total benefits at a compensation rate of $328.97 (Claimant's Exhibit 15).

On the other hand, Respondents argue that Section 10(a) is not applicable because "Claimant was injured on his first day of work with this Employer, and for many years prior to commencing work for Bludworth, the Claimant was self-employed." Thus, self-employment

is not employment for compensation purposes. Furthermore, the work performed by Claimant "while self-employed was distinctively different from the nature of the work done as a welder/fitter for the Employer." Claimant was an oil field and pipeline welder and only about "nine per cent of the days worked involved any arguable maritime connection." Respondents argue that Section 10(b) is applicable and Claimant's average weekly wage is determined by the wages of "employees of the same class who worked as welders for substantially the whole of the year immediately preceding the injury." Under Section 10(b) the average weekly wage of these three employees is $225.90 with a compensation rate of $150.60 . . .", citing *Alexander Toraiff v. Triple A Machine Shop*, 1 BRBS 465, BRB No. 74-205 (May 14, 1975).

Furthermore, Respondents argue that "Section 10(c) cannot be used as Section 10(b) applies . . ." and "the wage information submitted by the Claimant not only covers a period extending beyond the twelve months immediately preceding the injury but does not take into account the expenses incurred by the Claimant while self-employed." Moreover, Respondents argue that "no amounts are due for temporary partial disability, since the weekly earnings of the Claimant in these subsequent jobs appear to be in all instances higher than the average weekly wage he would have under Section 10(b) of the Act . . . The burden is on the Claimant to demonstrate loss of wage-earning capacity, and the failure to do so will defeat his entitlement to benefits for temporary partial or temporary total disability. . . . Because compensation has been paid in excess of the amount which is due under Section 10(b) of the Act, no claims for penalties, interest,

or attorneys fee can be allowed." (Respondents' Exhibits 7 and 8).

Furthermore, Respondents reject "an average weekly wage of $498.45 based on 188 days worked as a self-employed welder during the fifty-two weeks prior to his injury, under Section 10(a). . . . Section 10(a) cannot apply because as a self-employed welder this man was not either a five or a six-day worker," having "worked only 188 days during the fifty-two weeks immediately prior to his injury." An average weekly wage of $498.45 gives Claimant annual earnings of $25,896.00, or approximately $7,000.00 more than he actually earned in self-employed work as a welder, and a compensation rate of $328.97, an amount which is $103.00 per week more than the composite average weekly wage of the three welder/fitters whose average weekly wages were submitted pursuant to Section 10(b).

Findings of Fact and Conclusions of Law

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Sargent v. Matson Terminal, Inc.*, 8 BRBS 564, BRB Nos. 77-597, 597A (June 30, 1978); *Brandt v. Avondale Shipyards, Inc.*, 8 BRBS 698, BRB No. 77-103 (August 22, 1978); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 454, 467 (1968), *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). At the outset it further must be recognized that all factual doubts must be resolved in

favor of the Claimant. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Company v. Shea,* 406 F.2d 521 (5th Cir. 1969), *cert. denied,* 395 U.S. 921. Furthermore, it has consistently been held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel,* 345 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967); and finally that there is a presumption of compensability contained in Section 20 of the Act (33 U.S.C. § 920).

The Claimant, in my opinion, is a credible witness who is worthy of belief. He knows the sensations, pains and feelings in his back as his work may contribute to such sensation, pains and feelings.

In determining Claimant's average weekly wage, the total scheme of Section 10 of the Act and the interplay of the subsections must be considered. Compensation is to be based upon the employee's earning capacity in employment in which he was engaged at the time of injury. *Orkney v. General Dynamics Corp.,* 8 BRBS 543, BRB Nos. 77-877, 877A (June 30, 1978). The term "earning capacity" connotes the potential of the injured employee to earn (and is not restricted to a determination based on previous actual earnings). *Bonner v. National Steel & Shipbuilding Co.,* 5 BRBS 290 (January 7, 1977). "The purpose of the Act is thus to compensate a Claimant for the effect of an industrial injury on his earning power." Stated slightly differently, disability is an economic concept based on a medical foundation. *Owens v. Traynor,* 274 F. Supp. 770 (D. Md., 1966), *aff'd,* 396 F.2d 783 (4th Cir. 1968), *cert. denied,* 393 U.S. 962 (1968). It would frustrate the congressional purpose of compensa-

ting the economic impact of injury if we accepted the Employer's contentions. We look at the Claimant's pre-injury wage-earning history for the purpose of assessing the impact of injury on the Claimant's wage-earning capacity." *Steven Daugherty v. Los Angeles Container Terminals and Tokio Fire & Marine Insurance Co.,* 8 BRBS 363, 365, BRB No. 77-616 (May 31, 1978).

As is so concisely stated in Larson, The Law of Workmen's Compensation, Volume 2, Section 60.11, page 88 (1970):

> "To summarize: the entire objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this Claimant's own earnings in some arbitrary past period has been used as a wage basis."

Ordinarily, it is the average weekly wage of the employee at the time of the injury that is most appropriate. *Belton v. Traynor,* 381 F.2d 82 (4th Cir. 1967); *Robert Hastings v. Earth Satellite Corp.,* 8 BRBS 519, BRB Nos. 77-589A, 77-59B (June 30, 1978); *Keeler v. General Dynamics Corp.,* 5 BRBS 207 (ALJ), 76-LHCA-1051 (March 21, 1977).

Section 10 of the Act provides the only means for determining average weekly wage for compensation under the Act. Section 10(a) covers employees who have been injured while working at an employment in which they have been engaged during substantially the whole of the year immediately preceding the injury. Since a claimant was back at work as a longshoreman only about two months preceding his injury, the requirement of Section 10(a) was not met. *Steven Daugherty v. Los Angeles Container Terminals and Tokio Fire & Marine Insurance Co.*, 8 BRBS 363, BRB No. 77-616 (May 31, 1978).[2]

Sections 10(a) and (b) cannot reasonably and fairly be applied to industries where employment is casual, irregular, intermittent and discontinous. *Marshall v. Andrew F. Mahony Company*, 56 F.2d 74 (9th Cir. 1932); *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 74 (4th Cir. 1949); *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, BRB Nos. 75-177, 177A (February 25, 1976). Section 10(a) is inappropriate when the claimant did not work substantially the whole of the year immediately preceding his injury.[3] Likewise, the sporadic nature of inspection work renders Section 10 (b) inapplicable since this subsection requires the fact-finder to substitute the earnings of a fulltime worker for

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2. *Accord, Robert N. Ward v. General Dynamics Corp.*, 9 BRBS 569, 571, BRB No. 78-394 (December 29, 1978).

3. Section 10(a) cannot be used when the record does not reflect whether the claimant was a five or six-day per week worker. *Edward Duzant v. General Dynamics Corp.*, 8 BRBS 670, BRB No. 78-339 (August 11, 1978).

Claimant's average annual earnings. Therefore, it was held that Section 10(c) applies in such circumstances.

However, Section 10(a) should not be used to calculate the average weekly wage of a claimant who received a pay increase approximately six months prior to his injury since that section would not take into account such increases. Section 10 aims at a true reflection of claimant's earning capacity at the time of his injury. *Alexander Toraiff v. Triple A Machine Shop,* 1 BRBS 465, BRB No. 74-205 (May 14, 1975). Claimant's average weekly wage calculated under Section 10(a) would have yielded a lower weekly wage than the actual weekly wage claimant had been earning for approximately six months prior to his injury. Thus, the Board held that the method used by the Administrative Law Judge in arriving at an average weekly wage was proper, resulting, as it did, in an average weekly wage which was a truly reasonable approximation of Claimant's wage-earning capacity. *Alfred J. Gault v. Sun Shipbuilding & Dry Dock Co.,* 7 BRBS 104, 108, BRB No. 76-381 (December 14, 1977). In *Konda v. Bethlehem Steel Corp.,* 5 BRBS 58, BRB No. 76-240 (November 1, 1976) claimant's earnings for the preceding eighteen months were unusually low and discounted. Furthermore, claimant's average weekly wage should include overtime and a substantial pay increase since the overriding objective of Section 10 of the Act is to arrive at a fair and reasonable approximation of claimant's probable future wage-earning capacity. *Joseph Sobolewski v. General Dynamics Corp.,* 5 BRBS 474, BRB No. 76-306 (February 16, 1977), *aff'd sub. nom., General Dynamics Corp. v. Benefits Review Board,* 565 F.2d 208 (2nd Cir. 1977).

Furthermore, it is well-settled that the Act does not apply to an independent contractor. Thus, if Claimant had been injured at any time while owning and operating his own welding business, he would have been unable to bring a claim under the Act. In *Mary Gordon v. Commissioned Officers' Mess, Open, and Commercial Union Insurance Co.,* 8 BRBS 441, BRB No. 77-200 (February 13, 1978) the Benefits Review Board held that a musician was an independent contractor and not an employee within the meaning of the Act. The Board affirmed denial of the claim for compensation on the basis of the "right to control details of work" test. However, a building contractor and part-time lifeguard and professional diver who had been hired solely for shipbreaking work on the barge upon which he was injured was held to be a covered employee and not an independent contractor because (1) the employer had the right to fire claimant, (2) the employer's agent at the job site was in charge, (3) claimant was paid an hourly rate and (4) claimant had to rely on employer for necessary equipment. *Jack O. Wise v. Horace Allen Excavating Co. and Imperial Insurance Co.,* 7 BRBS 1052, 1056, BRB No. 77-326 (March 20, 1978).

Thus, as can be seen, Claimant's average weekly wage cannot be determined according to Section 10(a) because (1) Claimant, having been injured on his first day of covered employment, did not work substantially the whole year prior to his injury and (2) his earnings in that one year period were not those of a covered employee.

With reference to Claimant's argument that Section 10(c) applies herein, it is well-settled that recourse can-

not be made to the provisions thereof until it is determined that Sections 10(a) or (b) cannot be fairly and reasonably applied. Furthermore, Respondents maintain that Claimant attempts to obtain overcompensation by utilizing Section 10(c) to obtain what he cannot obtain by Section 10(a).

Section 10(c) is a catch-all provision and is to be used for seasonal, intermittent, discontinuous and part-time employment which affords less than a full work week or work year. *George Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, BRB Nos. 75-177, 177A (February 25, 1976); *Royal H. Allen v. Sea-Land Service, Inc.*, 5 BRBS 41, BRB Nos. 75-322, 322A, 322B (November 1, 1976).

Section 10(c) permits use of a variety of evidence to establish a claimant's earning capacity at the time of injury, which is the basis intended by Congress for determing compensation under the Act. *Gunther v. United States Employees' Compensation,* 41 F.2d 151 (9th Cir. 1930). Section 10(d) requires that the figure found under Section 10(c) to represent claimant's average annual earning capacity be divided by fifty-two to arrive at an average weekly wage. Section 10(c) measures earning capacity at the time of injury, not actual earnings. *Gunther, supra. Duzant, supra,* at 673.

Only when Section 10(a) does not apply is it appropriate to resort to subsection (b). *Alexander Toraiff v. Triple A Machine Shop,* 1 BRBS 465, BRB No. 75-205 (May 14, 1975).[4] Section 10(b) is used in cases where

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4. *Manuel Palacios v. Campbell Industries and Eldorado Insurance Co.,* 8 BRBS 692, BRB No. 7-267 (August 21, 1978).

a claimant has not been employed for substantially the whole of the year in the type of work he was performing at the time of injury. However, under the facts of this case, Section 10(b) would not render the most reasonable approximation of Claimant's probable future wage earning capacity due to the recent wage increases granted to those three selected co-workers.

Section 10(c) is to be used to determine claimant's average weekly wage whenever Section 10(a) and Section 10(b) cannot be reasonably and fairly applied. It is well-settled that the fact-finder has wide latitude in determining a claimant's average annual earnings pursuant to Section 10(c) because the overriding consideration is to arrive at a sum which reasonably represents claimant's probable future wage-earning capacity. *Emma J. Bonner v. National Steel and Shipbuilding Co.*, 5 BRBS 290, BRB No. 76-241 (January 7, 1977). The average annual earnings of the claimant are then divided by fifty-two in accordance with Section 10(d) to determine the average weekly wage. The Board held that although the Administrative Law Judge used the wrong section, Section 10(a), there was no reason to remand the case because the average weekly wage determined by the Administrative Law Judge achieves the result for which Section 10 is designed, as it is a reasonable approximation of claimant's probable future wage-earning capacity. *Charles C. Keeler v. General Dynamics Corp.*, 7 BRBS 989, 993-994, BRB No. 77-287 (February 28, 1978).

Section 10(c) mandates consideration of the previous earnings of the injured employee in the employment in which he was injured, earnings of other employees similarly situated to the claimant and earnings from additional

employment in which the employee was engaged at the time of the injury. This is a catch-all provision, the purpose of which is to arrive at a reasonable and fair basis for compensation. *Daugherty, supra,* at 364.[5]

Section 10(c) must be used where employment is seasonal at a port which, because of ice, is in full operation no more than thirty weeks a year. In computing pursuant to Section 10(c) the average weekly wage of a claimant employed at a port of steadily increasing business, the Board averaged the wages of four similarly-situated employees earned during the year succeeding the date of injury and did not take into account claimant's actual wages earned during the year prior to date of injury. The average 1974 earnings of the four similarly-situated employees are more representative of the Claimant's wage-earning capacity. *Fred Jesse v. Tri-State Terminals, Inc. and Liberty Mutual Insurance Company,* 7 BRBS 156, BRB Nos. 76-448, 448A, 448B (December 20, 1977); *Barber v. Tri-State Terminals, Inc.,* 3 BRBS 244, RB Nos. 75-177, 177A (February 25, 1976).[6]

Recently the Seventh Circuit Court of Appeals affirmed the Board's decisions in *Jesse* and *Barber,* holding that Section 10(c) permits the computation of disability benefits to be based in part on the post-injury earnings of claimant's co-workers working at a port open only thirty weeks in the year preceding the injury but which remained open during a greater part of the year follow-

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5. *Jesse P. Parks v. John T. Clark & Son of Maryland, Inc., and American Mutual Insurance Co.,* 9 BRBS 462, BRB No. 77-478 (December 27, 1978).

6. *Bonner, supra; Gunther v. United States Employees' Compensation Commission,* 41 F.2d 151 (9th Cir. 1930).

ing the injury. *Tri-State Terminals, Inc., et al v. Fred Jesse, et al,* 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The Seventh Circuit Court of Appeals rejected the employer's arguments that the statutory language, federal case law and the policy underlying the Act preclude consideration of circumstances existing subsequent to the date of injury. It is manifest that the prime objective of Section 10(c) was to insure that compensation awards would be based on accurate assessments of the claimant's earning capacity. *Jesse, supra,* at 705. Even if a claimant is engaged in fulltime employment, Sections 10(a) or (b) will not apply if they cannot reasonably and fairly be applied. In such situations Section 10(c) is to be applied even if it is possible to force the transaction into the formulae which Sections 10(a) and (b) prescribe. *Johnson v. Britton,* 290 F.2d 355, 359 (D.C. Cir. 1960), *cert. denied,* 368 U.S. 859 (1961).

An Administrative Law Judge may consider all sources of a claimant's income in arriving at an average weekly wage determination. Claimant's average weekly wage under Section 10(c) includes his non-maritime employments such as income from his contracting business, investments, a city council seat, life-guarding duties and various other activities. *Liberty Mutual Insurance Co. v. Britton,* 233 F.2d 699 (D.C. Cir. 1956), *cert. denied,* 312 U.S. 918 (1956); *Rex Investigative and Patrol Agency, Inc. v. Collura,* 329 F.Supp. 696 (E.D.N.Y. 1971); *Stutz v. Independent Stevedore Co.,* 3 BRBS 72, BRB No. 75-163 (October 15, 1975); *Wise v. Horace Allen Excavating Co.,* 7 BRBS 1052, BRB No. 77-326 (March 20, 1978).[7]

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7. Where claimant's actual earnings do not properly represent his future wage-earning capacity, Section 10(c) must be used since this

The legislative history surrounding the amendment of Section 10(c) discloses the following:

> "The measurement of an employee's capacity to earn should not be limited to his earnings in the particular employment in which he was engaged when injured, but should be gauged by what the employee is capable of earning in all employments in which he was employed during the year prior to injury, otherwise harsh results necessarily follow. The proposed change in subsection (c) seeks to avoid such harsh results by permitting consideration of earnings of the employee not only in the employment engaged in when injured, but all other employments in which he worked during the year prior to injury, *and is intended to be inclusive of the reasonable value of the employee's services if self-employed during part of such year.*" S. Rep. No. 1315, 80th Cong., 2d Sess. reprinted in [1948] U. S. Code Cong. Serv. 1979, 1982-83. (Emphasis added).

Therefore, it is manifestly clear that Section 10(c) was amended to permit the Administrative Law Judge to consider what the employee is capable of earning in all employments in which he was employed during the year prior to his injury.

On the basis of the foregoing review of applicable law pertaining to the determination of Claimant's average weekly wage, I find and conclude that Section 10(c) is

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method would furnish an average weekly wage which was a reasonable approximation of Claimant's future wage-earning capacity. *James D. Taylor v. Tri-State Terminals, Inc. and Liberty Mutual Insurance Co.*, 9 BRBS 531, 533, BRB Nos. 77-822, 822A, 822B (December 29, 1968); *John Conatser v. Pittsburgh Testing Laboratory and Liberty Mutual Insurance Co.*, 9 BRBS 541, BRB No. 77-507 (December 28, 1978).

the most appropriate method by which to arrive at a fair and reasonable average weekly wage for the Claimant. 33 U.S.C. § 910(c) provides:

> "If either of the foregoing (i.e., (a) or (b)) methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.
>
> (d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Claimant requests a compensation award based upon an average weekly wage of $498.45. I reject this claimed average weekly wage of $498.45 since this was not determined according to the statutory formula prescribed in subsections (c) and (d). Instead, Claimant used the methodology in Section 10(a), i.e., $18,741.00 ÷ 188 = ($99.60 × 260) ÷ 52 = $498.45. However, I find and conclude that such an average weekly wage overcompensates the Claimant and does not truly and reasonably represent his future wage-earning capacity. The resulting compensation rate of $328.97 is approximately $103.00 per week more than the composite average weekly wage of the three welder/fitters who were five-day workers for the Employer during the year immediately

prior to Claimant's injury. Furthermore, I cannot accept the Respondents' claimed average weekly wage of $225.-90, as this figure does not truly and reasonably represent Claimant's future wage-earning capacity.

Section 10(c) applies if there is insufficient evidence to make a determination under Sections 10(a) or (b). *Robert McDonough v. General Dynamics Corporation,* 8 BRBS 303, BRB No. 77-834 (May 30, 1978). The record reflects that at the time of Claimant's injury the Employer employed approximately two hundred workers, one hundred of whom were welder/fitters. In an attempt to comply with the requirements of Section 10(b), the Respondents have submitted the earnings history of only three five-day co-workers in Claimant's work classification who worked substantially the whole of the year prior to this injury and who were paid the same hourly rate as Claimant. As a worker gained tenture, he would receive an additional nickel or dime hourly increase (Tr. 126-127, 132). However, Mr. Hammann admitted that there might be other co-workers, among that group of one hundred welder/fitters, who had as much as twenty years experience, remarking that a Johnny Colunga "has been there at least fifteen years" (Tr. 130-134). Yet, the record does not contain Mr. Colunga's earnings during the appropriate time.

Therefore, on the basis of the totality of the record, I find and conclude that Section 10(b) would not furnish a truly reasonable average weekly wage representative of Claimant's future wage-earning capacity due to (1) the yard-wide substantial pay increase of fifty cents per hour two months before Claimant's injury and (2) the statistical sample of three out of one hundred welder/fitters at

Employer's shipyard is not adequate quantum-wise. If it is unreasonable to accept Claimant's pre-injury earnings as not properly including a recent wage increase, then certainly it is just as unreasonable to accept the Section 10(b) evidence submitted by Respondents. As the Board has held, "in this particular case, the same reasons that preclude the application of Section 10(a) preclude the application of Section 10(b)." *Henry C. Strand v. Hansen Seaway Service, Ltd. and U. S. Fidelity & Guaranty*, 9 BRBS 847, 850, BRB Nos. 77-508, 508A (January 30, 1979).

In the year preceding his injury, Claimant missed five weeks due to kidney stone surgery (Tr. 49-50) and four weeks between terminating his own business as an independent contractor and his injury on the first day of work at the Employer (Tr. 36). Section 10(d) requires that a divisor of fifty-two be utilized to determine Claimant's average weekly wage. Claimant requests a lower figure as a divisor, citing *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, BRB No. 77-643 (May 26, 1978). *O'Connor* is not applicable herein because *O'Connor* involved a determination of average weekly wage under Section 10(a), the Board holding that such wage under Section 10(a) is not to be diminished for time not worked during the fifty-two weeks preceding injury due to such reasons as strikes, personal business, illness or weather. It is obvious that the formulas in Sections 10(a) and (b) are different than the procedures in Sections 10(c). Furthermore, a determination under Section 10(a) was also involved in *Richard J. Cipollone v. General Dynamics Corporation*, 7 BRBS 94, BRB Nos. 76-359, 359A (December 13, 1977).

Using as a divisor the number of weeks actually worked by the employee rather than fifty-two is not permitted by the Act. The use of a lower figure as a divisor would result in the Claimant being overcompensated, resulting, as it would, in a higher average weekly wage. The Board has recently rejected the use of a lower divisor in a matter involving a Section 10(c) determination. "Obviously, Section 10 is an imperfect scheme and will sometimes render a result which may appear unfair. However, application of Section 10(d) is mandatory and cannot be waived." *Henry C. Strand v. Hansen Seaway Service, Ltd. and U. S. Fidelity & Guaranty Company,* 9 BRBS 847, 850, BRB Nos. 77-508, 508A (January 30, 1979). Furthermore, I am cognizant of the fact that the Board has sanctioned the use of a thirty-nine week divisor, in a Section 10(c) determination, where the Employer failed to submit records which might have provided information for determining a Claimant's average weekly wage according to Section 10(a), holding that the Administrative Law Judge was not obligated to obtained additional records. The "use of a thirty-nine week divisor . . . was reasonable in light of the fact that his wage records for the remaining thirteen weeks were unavailable." *Henrietta C. Brown v. General Dynamics Corp.*, 7 BRBS 561, 567, BRB Nos. 77-146, 146A (January 31, 1978).

On the basis of the totality of the record evidence, I find and conclude that Claimant's work as a self-employed welder in the year preceding his injury is substantially similar to the duties he performed at the Employer until he commenced working at Badger America on August 3, 1976. However, assuming, *arguendo,* that the previous work is not substantially similar, under Sec-

tion 10(c) I can consider income from non-maritime sources. *Britton, supra; Collura, supra; Stutz, supra.* Therefore, I find and conclude that Claimant's actual earnings in the year preceding his injury may reasonably be considered under Section 10(c). *Royal H. Allen v. Sea-Land Service, Inc.*, 5 BRBS 41, BRB No. 75-322 (November 1, 1976).

The record reflects that Claimant earned $18,741.20 as a self-employed welder in the year preceding his injury. On the basis of the totality of the record, I find and conclude, pursuant to Section 10(c), that such sum reasonably represents the Claimant's annual earning capacity. Furthermore, pursuant to Section 10(d), the divisor of fifty-two weeks produces an average weekly wage of $360.41, an average weekly wage which I find truly and reasonably represents Claimant's future wage-earning capacity. (Furthermore, a divisor of forty-three weeks produces an average weekly wage of $435.84.) Moreover, I find that Claimant's expenses while self-employed were minimal and no deduction should be made for his annual earnings for these expenses. I find and conclude that these earnings are the reasonable value of his services while self-employed. Furthermore, any deductions for expenses, would be more than off-set by Claimant's hourly rate increase from $10.50 to $12.50 at the beginning of 1975, representing, as it does, his increased earning capacity.

Nature and Extent of Disability

It is well-settled that a permanent disability is one that is continual, appears to be lasting and indefinite and is without a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Gray v. Gen-*

eral Dynamics Corporation, 5 BRBS 279, BRB No. 76-105 (December 21, 1976), *aff'd on other grounds sub nom. General Dynamics Corporation v. Benefits Review Board,* 565 F.2d 108, 7 BRBS 831 (2nd Cir. 1977); *Unger v. National Steel & Shipbuilding,* 5 BRBS 377, BRB No. 76-233 (January 25, 1977); *see White v. Exxon Co.,* 9 BRBS 138, BRB No. 78-395 (October 20, 1978). However, a disability is considered temporary until claimant has reached maximum medical improvement. *McCray v. Ceco Steel Company,* 5 BRBS 537, BRB No. 76-405 (March 8, 1977); *Cannizzo v. Frank J. Holleran, Inc.,* 6 BRBS 484, BRB No. 76-232 (August 23, 1977). The fact that a claimant has worked after the injury does not preclude a finding of total disability. *Haughton Elevator Company v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978).

On the basis of the totality of the record evidence and having observed the demeanor of the witnesses, I conclude and find that Claimant was temporarily and totally disabled from April 22, 1975, the day of the injury, to the present time and continuing, less any time therein Claimant was able to work. I find that Claimant has not yet reached maximum medical improvement.

Temporary Partial Disability

Respondents have taken the position that "the Claimant injected the issue of temporary partial disability at the hearing . . . , that no recommendation was ever made by the Deputy Commissioner concerning any temporary partial disability, and to the time of the formal hearing, no claim had been made for temporary partial disability with respect to wages earned by the Claimant subsequent

to this injury." (Respondents' post-hearing brief, Respondents' Exhibit 7, pg. 10 and Tr. 58-71). On the other hand, Claimant argues that (1) the issue of temporary partial disability is properly before this Administrative Law Judge as the Deputy Commissioner had referred the entire claim to Office of Administrative Law Judges, (2) that no recommendation could be made on temporary partial disability without an average weekly wage and (3) that the Deputy Commissioner could administratively compute the amount of past due compensation for temporary partial disability (Tr. 55-56, 58 and 65).

With reference to post-injury employment, I have credited Claimant's testimony that upon his return to Employer's shipyard he performed "the same type of work" (Tr. 42) and that his post-injury employment was performed while he was in pain and that he had to quit these jobs because of the pain and his fear of heights resulting from the fall on April 22, 1975 (Tr. 83, 88-90 and 91).

Based upon the totality of the record and having observed the demeanor of the witnesses, I find and conclude that Claimant, in addition to the eighty and one-sevenths weeks of compensation already paid him for those weeks he could not work, is entitled to an award of compensation for temporary partial disability for those weeks he attempted to work but was unable to work a complete forty hour, five-day week. Such compensation, computed pursuant to Section 8(e), should be based upon the average weekly wage of $360.41 determined herein and Claimant's post-injury wage-earning capacity at those jobs identified in Claimant's Exhibits 3 through 8. These

exhibits reflect that from April 25, 1975 to March 29, 1978 Claimant worked a total of 108 weeks and had gross earnings of $33,714.50, producing an average weekly wage of $312.17.

Medical Expenses

It is well-settled that an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, liable for the medical expenses incurred as a result of such injury. *Richard Perez v. Sea-Land Services, Inc. and Travelers Insurance Company,* 8 BRBS 130, BRB Nos. 77-274, 274A (March 31, 1978). Furthermore, the statutory presumption under Section 20(a), 33 U.S.C. § 920(a), to the effect that "it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act", is as applicable to medical bills as to any other aspect of a compensation claim. The Act places the burden of adducing substantial evidence of noncompliance with the statutory scheme in Section 7 upon the Employer. *George O. Buckhaults v. Shippers Stevedore Co.,* 2 BRBS 277, BRB No. 75-132 (September 19, 1975).

Attorney's Fee and Cost

Counsel for the Claimant has submitted an application for an attorney's fee in the amount of $1,952.50 for 20.50 hours of work necessarily performed and costs of $378.69 incurred in the representation of the Claimant herein, a copy of which application has been furnished opposing counsel. Claimant's attorney has supported the application by an itemization of services rendered, which itemization I find substantially complies with the requirements of the

Regulations. *Matthews v. Walter,* 512 F.2d 941 (D.C. Cir. 1975). 20 C.F.R. § 702.132 provides "any fee shall be reasonably commensurate with the actual necessary work performed, and shall take into account the capacity in which the representation has appeared, the amount of benefits involved and the result obtained in the case." *White v. Old Dominion Marine Railway and Fidelity & Casualty Company of New York and Director, Office of Workers' Compensation Programs,* 7 BRBS 279, 282, BRB Nos. 76-168, 168A (August 12, 1976). It is noted that the services identified in the fee application (Claimant's Exhibit 16) were performed while this claim was pending in the Office of Administrative Law Judges.

The fee application has identified (1) the legal services rendered by Attorney Stephen M. Vaughan, a partner in the firm of Mandell & Wright, and (2) those services rendered by Investigator Tom Abercrombie. Mr. Vaughan requests (1) an hourly rate of $100.00 for 19 hours for himself and (2) an hourly rate of $35.00 for 1.50 hours performed by Mr. Abercrombie.

Respondents have made a general objection to the fee application on the ground "that they have not been afforded an opportunity to be heard or to cross-examine the applicant with respect to either the time expended or the basis of the hourly charges submitted nor [sic] to be advised with respect to the expenses incurred and paid by them to the doctors." (Page 3 of Respondents' Exhibit 3).

It is well-settled that such generalized objection to a fee application does not constitute sufficient grounds to deny or modify a claimed attorney's fee. Furthermore, a formal hearing on the application is unnecessary when

the fee request has been presented to the judicial officer before whom the work was performed. *Luker v. Ingalls Shipbuilding*, 3 BRBS 321, BRB No. 75-243 (March 19, 1976).

After examining the nature and extent of the services performed in light of applicable case law and 20 C.F.R. § 702.132 of the Regulations, I find the fee request to be most reasonable with the exception of the hourly rate claimed for Mr. Abercrombie. I find an hourly rate of $35.00 to be excessive and hereby allow, in this case, a rate of $25.00, having taken into account the nature and extent of those services Mr. Abercrombie performed on March 14, April 11 and 17, and May 29, 1979. Furthermore, I have allowed Mr. Vaughan's usual hourly billing rate of $100.00, as I find this to be the customary rate for firm partners in such cases in the Houston,Texas area.

With reference to the claimed expenses of $378.69, I have disallowed the amounts of $14.40 for "xerox copies", $4.00 for "file charge" and $.29 for "telephone". All such amounts are chargeable to overhead and are included in the basic hourly rates herein. I have allowed the amount of $100.00 for the medical-legal consultative services performed by Dr. J. McCutchen on April 25, 1979 in preparation for the formal hearing. However, I have disallowed the amounts of $200.00 on April 7, 1978 for Dr. McCutchen and $60.00 on August 8, 1978 for Dr. Bruce Cameron, as these costs were incurred while the matter was pending before the Deputy Commissioner. Therefore, these amounts should be submitted to the Deputy Commissioner for consideration. Furthermore, it should be noted that these expenses were not specifi-

cally characterized, as required by Section 28(d) of the Act.

In view of the foregoing, I hereby approve an attorney's fee of $1,937.50 and costs of $100.00 as reasonable legal services rendered in the representation of the Claimant herein while this matter was pending in the Office of Administrative Law Judges.

Section 14(e) Penalties

Claimant seeks penalties on all payments. However, Claimant does not cite any case holding that Claimant is entitled to the ten per cent award of additional compensation in this factual situation. On the other hand, Respondents maintain that Claimant is not entitled to an additional award of compensation as "the employee is being compensated at a rate which exceeds that calculated under Section 10(b), and all compensation due has been paid."

The record reflects that compensation has been paid, voluntarily and without an award, from April 22, 1975 to August 21, 1975 and from March 28, 1978 to the present and continuing. The compensation has been paid at various rates. The Respondents, having been advised of the injury, accepted the claim, referred Claimant to several doctors, had paid medical expenses and is still paying compensation benefits to the Claimant although at a disputed weekly rate. Therefore, in view of the lack of a "controversy" or "dispute", within the meaning of *Universal Terminal & Stevedoring Corporation and Midland Insurance Company v. Wendell Parker and Director, OWCP*, 587 F.2d 608, 9 BRBS 326 (3rd Cir. 1978),

imposition of the Section 14(e) penalty is not warranted here. Since there was no termination or suspension of compensation benefits, except for those weeks Claimant was working, it was unnecessary for the Employer to file a notice of controversion when there is no controversy. *Parker, supra,* at 621.

Interest on Past Due Compensation

It is mandatory the Claimant receive six per cent interest per annum on all unpaid installments of past due compensation computed from the date each such installment became due until paid. *Ryan v. McKie Company,* 1 BRBS 221, BRB No. 74-160 (December 10, 1974). *See also Strachan Shipping Company v. Wedemeyer,* 452 F.2d 1225 (5th Cir. 1971); *Newport News Shipbuilding & Dry Dock Company v. Director, OWCP,* 583 F.2d 1273 (4th Cir. 1978), *aff'g Jones v. Newport News Shipbuilding & Dry Dock Company,* 5 BRBS 323, BRB No. 76-320 (January 4, 1977).

Based upon the foregoing Findings of Fact, Conclusions of Law and the entire record, I make the following Compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner.

ORDER

It is therefore ORDERED that:

1. The Respondents shall pay to James P. Rountree, the Claimant, compensation for temporary total disability from April 22, 1975 to August 21, 1975 and from March

28, 1978 to present time and continuing throughout the continuance of such disability or until such time as a new compensation order is obtained pursuant to the provisions of Section 22 of the Act. Such compensation, based upon an average weekly wage of $360.41, is to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall pay to the Claimant compensation for temporary partial disability from August 22, 1975 to March 27, 1978, a time period representing those weeks Claimant attempted to work, during which he sustained a loss of wage-earning capacity. Such compensation, based upon an average weekly wage of $360.41, is to be computed in accordance with Section 8(e) of the Act.

3. The Respondents shall pay to the Claimant six per cent interest per annum on each past due installment of compensation until paid. The Respondents shall be credited with all amounts of compensation previously paid to Claimant as a result of his injury of April 22, 1975.

4. The Respondents shall furnish such medical care and treatment as the Claimant's injury of April 22, 1975 may require, subject to the provisions of Section 7 of the Act.

5. The Respondents shall, in addition, pay directly to the law firm of Mandell & Wright, Claimant's attorney, the sum of $1,937.50 as a reasonable fee and $100.00 as costs in the representation of Claimant while this

claim was pending in the Office of Administrative Law Judges.

/s/ DAVID W. DI NARDI
David W. Di Nardi
Administrative Law Judge

Dated: December 26, 1979
New Orleans, Louisiana
DWD:prc

APPENDIX E

Section 10, 33 U.S.C. § 910. Except as otherwise provided in this Act, the average weekly wage of an injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six day worker and two hundred and sixty times the average daily wage or salary for a five day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six day worker, shall consist of three hundred times the average daily wage or salary and, if a five day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be ap-

plied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury and of other employees of the same and most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self employment, shall reasonably represent the annual earning capacity of the injured employee.

Section 21(c), 33 U.S.C. § 921(c):

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed

pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.